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The meeting was called to order at 9.40 a.m.

Agenda item 80: Report of the International Law Commission on the work of its fifty-seventh session (*continued*) (A/60/10)

1. **Mr. Panahiazar** (Islamic Republic of Iran), referring to the topic "Effects of armed conflicts on treaties", welcomed the first report of the Special Rapporteur (A/CN.4/552) and noted with satisfaction that the Commission had endorsed the suggestion that a written request for information should be circulated to Member States. His delegation supported the basic policy underlying the draft articles presented by the Special Rapporteur, which was to clarify the legal position in respect of the effects of armed conflicts on treaties and to promote the security of legal relations between States. He also welcomed the approach of making the draft articles compatible with the Vienna Convention on the Law of Treaties. However, the subject was also closely related to other domains of international law, such as international humanitarian law, self-defence and State responsibility. He hoped that the Special Rapporteur would consider those relationships in his next report.

2. In draft article 2, paragraph (b), the definition of "armed conflict" referred simply to "a conflict" rather than an "international conflict". Internal armed conflicts would therefore be included in the scope of the term. However, an internal armed conflict should not have any effect on treaties concluded between the State in which the conflict was taking place and other States. If a State affected by internal armed conflict failed to fulfil its treaty obligations, such failure would be dealt with under the law of State responsibility: the conflict might well make it impossible for the State concerned to meet those obligations, a circumstance which clearly precluded its conduct from being characterized as wrongful. In addition, a broad definition of "armed conflict" was more likely to jeopardize than to strengthen treaty relations.

3. Under draft article 4, paragraph 2 (b), the "nature and extent of the armed conflict" was referred to as a sine qua non for determining the intention of the parties to a treaty relating to its susceptibility to termination or suspension. However, he questioned whether the nature and extent of an armed conflict should be a factor in determining the intention of the parties at the time of conclusion of the treaty, since such an intention would pre-date the conflict.

4. With regard to draft article 6, his delegation supported the Special Rapporteur's conclusions that the supposition that a treaty forming an element in a dispute was a nullity simply because it formed part of the "causes" of an armed conflict was unacceptable and that it was unreasonable to presume that a treaty which served as the basis of an armed conflict and which later was the subject of some process in accordance with law should be assumed to be annulled.

5. Draft article 7, paragraph 2, contained a set of categories of treaty whose object and purpose involved the necessary implication that they continued in operation during an armed conflict. However, paragraph 2 (b) referred simply to treaties declaring, creating or regulating permanent rights or a permanent regime or status. It would be preferable to list explicitly in that paragraph the types of agreement in the relevant category that were mentioned in the Special Rapporteur's report, in particular treaties creating or modifying boundaries, which played an essential role in the stability of international relations.

6. It went without saying that a State exercising the right of self-defence should not be placed on the same footing as a State committing an act of aggression. In State practice, an act of aggression, which was an unlawful act, could not produce legal effects. Draft article 10 in its current form might be interpreted as giving an aggressor State the right to suspend or terminate certain treaties, thereby assisting it in an unlawful act. The draft article should therefore be adjusted to bring it into line with the articles on Responsibility of States for Internationally Wrongful Acts, which were aimed precisely at putting an end to such acts.

7. The Islamic Republic of Iran could not condone any provision that might encourage an aggressor to pursue its aggressive purposes. However, it was quite logical for the victim State to be assisted in exercising its right of self-defence, including through the suspension or termination of treaties that were incompatible with or might impede the exercise of that right.

8. **Mr. Ma** Xinmin (China), referring to the topic "Effects of armed conflicts on treaties", welcomed the first report of the Special Rapporteur (A/CN.4/552) and the memorandum prepared by the Secretariat on

the topic (A/CN.4/550 and Corr.1). The scope of application of the draft articles was too narrow in that it was restricted to treaties between States. Some treaties entered into by international organizations were also affected by armed conflicts and should therefore be included in the scope of application. On the other hand, the definition of "armed conflict" was too broad. It should be strictly limited to international armed conflicts; otherwise, military action taken by a State internally against rebel groups might be inappropriately included in the scope of application of the draft articles.

9. His delegation agreed with the view that the outbreak of an armed conflict did not ipso facto terminate or suspend the operation of treaties. Compliance with that principle would contribute to the stability of treaty relations. His delegation also agreed that the intention of States parties was an important criterion in determining whether a treaty should be terminated or suspended at the outbreak of an armed conflict. However, when States concluded a treaty, they did not generally anticipate or make arrangements for the application of the treaty during armed conflicts. Their intention should therefore be determined on the basis not only of their intention at the time of concluding the treaty but also of their implementation of the treaty, including the situation after the outbreak of armed conflict. Furthermore, the nature, object and purpose of the treaty should also be taken into account when determining intention.

10. With regard to draft article 10, his delegation fully understood the Special Rapporteur's view that determining the illegality of the use of force was a highly political issue and that, in the absence of such a determination by an authoritative body, allowing a State to affect the validity of a treaty through a unilateral assertion of the illegality of the conduct of another State would be inimical to the stability of international relations. However, the legitimacy of the use of force did have a bearing on treaty relations. For example, since the Charter of the United Nations recognized a State's right to act in self-defence until the necessary measures had been taken by the Security Council, a State should be entitled, when it exercised that right in accordance with the Charter, to suspend in whole or in part the implementation of a treaty that conflicted with that right. Those issues should be studied in greater depth.

11. With regard to diplomatic protection, his delegation supported the Special Rapporteur's view that it was not necessary to include the clean hands doctrine in the draft articles on that topic.

12. Turning to the topic "Fragmentation of international law", he welcomed the initial results achieved by the Study Group. The study of the topic, in particular the issues of the *lex specialis* rule, self-contained regimes and hierarchy in international law, was not only of theoretical significance but also of major practical importance. It would facilitate international consensus on the issues involved, consolidate the supremacy of the basic principles of international law and promote the standardization of international practice, thereby helping to establish the rule of law throughout the international community.

13. **Ms. Lintonen** (Finland), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) commended the Commission's decision to focus on the substantive aspects of the fragmentation of international law in the light of the Vienna Convention on the Law of Treaties and to leave aside institutional considerations pertaining to the proliferation of international tribunals and to forum shopping. Although the Vienna Convention offered a wealth of material which would be useful when grappling with the difficulties posed by the topic of fragmentation, it would nonetheless be helpful if the Commission were to elucidate the conflict rules contained in the Convention, as very little consideration had been given to them to date. She likewise welcomed the Study Group's interest in the various legal techniques that could be employed, and had been employed, by international judicial bodies to solve the normative conflicts that overlapping competence and scope of application tended to generate. Of course, it would be impossible to put a complete end to such conflicts in a globalizing world where legal writings should not only provide coherence and unity, but also outline clearly any difficulties encountered. Hence the outcome of the Commission's work was likely to be of great interest to practitioners of international law. It was certainly true that international law did not comprise a random collection of directives, but constituted a system which actually set out to establish the relationship between different rules by means of legal reasoning.

14. The validity of the Study Group's postulate that the maxim *lex specialis derogat legi generali* would

not lead to the extinction or total replacement of general law had been confirmed by the advisory opinion of the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons* case and by its advisory opinion in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case.

15. The Nordic countries appreciated the attention devoted to prohibited *lex specialis*, in other words, situations where there could be no derogations from general law because it took the form of *jus cogens*, or because it benefited third parties, including individuals. While complications might occur when multilateral treaties created an integral or independent regime, or when the subsequent practice of parties made it clear that contracting out was not allowed, article 311 of the United Nations Convention on the Law of the Sea was indicative of a general unwillingness to tamper with integral regimes which carefully balanced the rights and obligations of various States. Similarly, in negotiations concerning the revision of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, preserving the coherence of the law of the sea jurisdictional regime had been deemed too important to allow any exceptions to the principle that the flag State of a vessel retained exclusive jurisdiction over it while it was on the high seas, despite the fact that the majority of delegations had favoured the inclusion in the Convention of new provisions on the boarding and searching of a vessel on the high seas as a counter-terrorist measure. Stronger arguments in favour of the overall conclusion as to the omnipresence of general law might indeed be found through more thorough scrutiny of the concept of general law.

16. The Nordic countries welcomed the suggestion that the term "self-contained regimes" should be discarded as it was misleading. The less dramatic notion of "special regimes" would provide an adequate framework for dealing with the new issue of disconnection clauses. While the investigation of such clauses would not, in all probability, alter the main conclusion of the study, namely that the use of special treaty regimes had not seriously undermined legal security, predictability or the equality of legal subjects, the Nordic countries had noted the Commission's concern that such clauses might sometimes erode the coherence of the treaty and that it was therefore important to ensure that they would not be used to defeat its object and purpose.

17. The study of the interpretation of treaties in the light of any relevant rules of international law applicable in the relations between parties (article 31, paragraph (3) (c), of the Vienna Convention on the Law of Treaties) offered valuable insight into the fairly frequent recourse to that course of action by judicial bodies in recent years. In essence, it could be held that no convention worked in a vacuum and that the general law continued to fill in aspects of a treaty regime for which no express provision had been made. As very few treaties were able to cover in an exhaustive manner all aspects of the area they regulated and as the problems and threats necessitating international cooperation were increasingly interdependent, the role of other rules in the interpretation and implementation of international instruments was growing in importance. At the same time, it was obvious that taking a broader view should not result in an attempt to rewrite the treaty in question and that adherence to the other rules of treaty interpretation was essential. The Nordic countries therefore welcomed the thought being given to the role of customary law and general legal principles. The examples of case law cited by the Commission in its report (A/60/10) gave the impression that international judicial bodies were, in fact, alive to the risks of fragmentation and that they strove to promote a consistent and coherent application of law. That had also been the message conveyed by the representative of the European Court of Justice, who had addressed the Council of Europe Committee of Legal Advisers on Public International Law in September.

18. The study on the hierarchy in international law: *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations as conflict rules was not only of considerable theoretical value, but was also of practical interest, as recent controversy concerning the compatibility of counter-terrorism measures with human rights law had shown. According to the study, *jus cogens* was the only instance of a real hierarchy in international law, because the relationship between the obligations of States Members of the United Nations under the Charter and their other obligations was described as a quasi-hierarchy. The study contended that the concept of *erga omnes* was not concerned with a hierarchical relationship, but with the horizontal scope of the obligations in question. The study had

dealt with possible conflicts between various norms and obligations under international law and had seemed to accept the widely held view that the powers of the Security Council, albeit exceptionally wide, were limited by the peremptory norms of international law. A number of the observations made in the study were eminently practical, as was the decision to confine the study to the consideration of the three subjects as conflict rules. It might, however, be interesting to extend the scope of the study to take in the concept of normative conflict and to consider whether it covered both negative derogation from a given peremptory rule and positive derogation in the sense of creating particular rules that expanded the protection provided by the peremptory rule.

19. While the Nordic countries felt that the work on the topic of fragmentation was on the right track, it regretted that the Study Group's discussion papers had not been available on the Commission's website. They commended the Commission for focusing its attention on the clarification of the conflict rules to be found in the Vienna Convention on the Law of Treaties and for revisiting article 55 on *lex specialis* of the articles on Responsibility of States for Internationally Wrongful Acts. They appreciated the fact the Commission and its Study Group had interacted with international judicial institutions so as to gain an idea of the kind of difficulties caused by conflicts of norms and of the way such difficulties had been resolved in practice. The final outcome of the Commission's work on the topic should ideally reflect its practical orientation, while preserving the analysis provided in the background studies. A single document consisting of an analytical section and a condensed set of practical conclusions would seem to serve both purposes. The Nordic countries therefore welcomed the Study Group's intention to submit a draft of both documents for adoption by the Commission at its fifty-eighth session.

20. **Mr. Hernes** (Norway), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that they would respond in writing to the request for comments on the draft articles on diplomatic protection before the deadline of 1 January 2006. Meanwhile, they were generally satisfied with the proposed thrust of the draft articles and the end product envisaged by the Special Rapporteur. They supported the premise that States had a right rather than a duty to exercise diplomatic protection. Moreover, they believed that the principles and rules of diplomatic protection were without prejudice to the law of consular protection and other applicable rules of international law, including those pertaining to the law of the sea.

21. Under draft article 5, a requirement for the exercise of diplomatic protection was continuous nationality. At issue was whether the requirement should apply until the resolution of the dispute or the date of an award or judgement, or only until the official presentation of the claim. In practice, it could be very difficult to establish the exact time of resolution of a dispute. The Nordic countries therefore supported the Commission's approach, whereby a State might exercise diplomatic protection in respect of a person who was its national both at the time of the injury and at the date of the official presentation of the claim.

22. The Nordic countries strongly supported the Commission's approach in draft article 7. In cases of multiple nationality, the State of nationality that was predominant at the time both of the injury and of the official presentation of the claim should be entitled to exercise diplomatic protection against another State of nationality of the person concerned. The draft article constituted a codification of existing customary international law. It should be added, for clarity's sake, that the rule had no bearing on the possibility of providing consular assistance, which was not governed by the law pertaining to diplomatic protection. The Nordic countries were particularly pleased that the Commission had included a provision on the diplomatic protection of stateless persons and refugees in certain cases, thus rejecting earlier opinions that a State should exercise diplomatic protection only on behalf of its nationals. It was most important to be able to offer diplomatic protection to such vulnerable categories of persons.

23. The Nordic countries supported the flexible approach in the commentary to draft article 8, which established that the term "refugee" was not necessarily restricted to persons falling within the definition contained in the Refugee Convention and its Protocol. They considered that a State might extend diplomatic protection to persons who fulfilled the requirements of territorial connection to that State and who, in the State's judgement, were clearly in need of protection, without necessarily formally qualifying for refugee status. As for the suggestion that, to qualify for diplomatic protection, the stateless person or refugee must have lawful and habitual residence in the State

exercising diplomatic protection at the time of the injury and at the date of the official presentation of the claim, the Nordic countries considered the requirement too onerous. In many cases where effective diplomatic protection was needed, the injury would have occurred prior to the entry of the person concerned into the territory of the State exercising diplomatic protection. The suggested criterion should therefore be modified. The Commission should consider replacing the phrase "lawfully and habitually resident" in draft article 8 by the phrase "lawfully staying", which was the wording used in article 28 of the Refugee Convention in relation to the issuing of travel documents to refugees.

24. With regard to the exercise of diplomatic protection on behalf of shareholders, the Nordic countries welcomed the fact that the Commission had ensured overall consistency with the case law of the International Court of Justice, on the basis of the *Barcelona Traction* case. The Nordic countries also fully supported the approach in draft article 19, whereby a flag State's right to exercise diplomatic protection did not exclude the possibility of the same right being exercised by the State of nationality of the crew members of a ship, and vice versa. That was a solution that ensured that important protective measures established by the law of the sea were not undermined. As for the clean hands doctrine, the Nordic countries shared the view that it should not be included in the draft articles.

25. He urged the Commission to proceed swiftly to the adoption of the articles on second reading. The Nordic countries believed, moreover, that the provisions on diplomatic protection should, in the not too distant future, be adopted in the form of a convention, thus enhancing clarity and predictability in an important field of law.

26. **Mr. Bühler** (Austria) said that his delegation concurred with the Special Rapporteur's view that the draft articles on the effects of armed conflicts on treaties should not deal with the legality of armed conflicts. It did not, however, share the view that the draft articles should also apply to non-international armed conflicts. Although it was often difficult to distinguish between international and non-international armed conflicts, with the latter by far outnumbering the former, the draft articles should regulate the legal effects of international armed conflicts only, given the fact that, according to draft article 2 (a), treaties were by definition international agreements. Extending the scope of the draft articles to non-international conflicts would inevitably raise the question of how such conflicts should be defined and how the other State party to a treaty could ascertain whether or not such a conflict existed. The resulting uncertainty would run counter to the objective of stability and predictability in international relations.

27. The underlying concept of draft article 3 constituted the point of departure of the whole set of draft articles. It should therefore be retained. Draft article 4, by contrast, prompted a number of questions. The text suggested that the intention of the parties was to be determined primarily from the text of the treaty. If that was the case, it might be asked why the text should not contain a direct reference to the content of the treaty, and to its object and purpose, rather than going the long way round by referring to the parties' intention. A further question related to the basic effects of armed conflicts on treaties. Although the draft article referred to susceptibility to suspension or termination, none of the subsequent provisions explicitly defined the legal consequences thereof. For clarity's sake, the draft article needed further elaboration. Given the complexity of the issue, the draft article might even be split into several provisions.

28. His delegation would submit written comments on the topic "Diplomatic protection". Meanwhile, it concurred with the view that the clean hands doctrine should not be included in the draft articles. Apart from the complex theoretical questions involved, it was undoubtedly not sufficiently anchored in general international law to be considered an established customary rule. None of the judicial bodies of global significance had ever referred to the doctrine affirmatively, although it had been invoked by several States. It was also questionable whether the doctrine, if it existed as a generally applicable rule of customary international law, would fall within the purview of diplomatic protection. As stated in the Special Rapporteur's sixth report (A/CN.4/546), it could be considered a bar to the admissibility of a claim; and that was certainly outside the scope of the matter under consideration.

29. With regard to the topic "Fragmentation of international law", his delegation was most appreciative of the work of the Study Group. The individual items, and the form of the final report, were well chosen. The discussions had revealed the existence of conflicting norms in the international legal

order and a lack of instruments to resolve possible conflict. His delegation also concurred with the view that regionalism was only a specific sub-item of the general issue of *lex specialis*. As for the study on the interpretation of treaties in the light of "any rules of international law applicable in the relations between the parties", in accordance with article 31, paragraph 3 (c), of the Vienna Convention, his delegation concurred with the view that article 31 referred not only to treaty law but also to customary law and general principles of law. The latter two categories, however, had a limited effect. Since their purpose was the interpretation of treaty provisions, they could neither diminish the scope nor change the legal substance of such provisions. The objective of "systemic integration" endorsed by the Study Group seemed a viable compromise for overcoming problems arising in that context.

30. With regard to the question of hierarchy in international law, his delegation welcomed the Study Group's approach, especially its insistence on the need to distinguish clearly between the effect of Article 103 of the Charter of the United Nations and that of peremptory norms. As for obligations *erga omnes*, his delegation shared the view that the issue fell outside the question of hierarchies. On the other hand, it wondered whether the relation between the primary and the secondary rules of an international organization would fall within the ambit of the topic.

31. **Mr. Kim** Sun-pyo (Republic of Korea), responding to the questions posed by the Commission concerning the topic "Effects of armed conflicts on treaties", said that the Commission should, for the time being, restrict the scope of its work to agreements between States. To reflect the legal effects of armed conflicts between States on the operation of agreements between organizations or between organizations and States in the draft articles would make them more complicated and perhaps unmanageable. Further study should be made of the practice in that regard.

32. With regard to the definition of "armed conflict", it would suffice if the Commission simply indicated the main features of armed conflicts, where necessary for the context. Defining the concept would involve two different branches of law — the law of treaties and international humanitarian law — and it would be superfluous for the Commission, in dealing with the topic under the law of treaties, to try to codify a concept that would be further developed by international humanitarian law. The definition of armed conflict had been developed by the relevant jurisprudence, including the *Tadić* Appeals Chamber judgement by the International Tribunal for the Former Yugoslavia and the *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) judgment by the International Court of Justice. As for the continuity of treaties, the Commission's questions were based on the assumption that such continuity had been consolidated as a principle of international law. For his delegation, further clarification was required as to whether or not that was the case.

33. With regard to the draft articles, his delegation wondered whether, in draft articles 1 and 2, the term "armed conflict" fully covered all the possibilities. It should first be determined whether the scope of the topic would cover all the situations coming under international humanitarian law. The term "armed conflict" might not accurately reflect the situation, given that other forms of hostilities — ranging from traditional declared war to occupation with no armed resistance or the struggle against colonial domination, alien occupation or racist regimes — could also affect the operation of treaties. If the draft articles were supposed to cover all such circumstances, the term "hostilities", which appeared in article 73 of the Vienna Convention on the Law of Treaties, might be a better option. Moreover, the definition of armed conflict in draft article 2 (b) overlooked the fact that belligerents were frequently reluctant to recognize a state of war.

34. Draft article 3 need not feature as a separate article, since its stipulation that an armed conflict did not ipso facto terminate or suspend the operation of treaties was implied by draft articles 4 to 7. In that context, he pointed out that the intention of the parties to a treaty was often ambiguous or impossible to prove. To use such intention as a criterion might therefore not be enough to determine the termination or suspension of treaties. Article 4 could thus be improved by incorporating features of draft articles 5 and 7, such as express provisions and the object and purpose of treaties.

35. Draft article 5, paragraph 2, concerning the competence of States during an armed conflict, did not seem to belong within that article. For the sake of

greater clarity, the paragraph should become a separate article.

36. With regard to draft article 7, paragraph 2, the list of treaties that continued in operation during an armed conflict needed further consideration. A clearer indication of State practice and case law was required to support the inclusion of most of the categories of treaty mentioned in the paragraph. For instance, the applicability of human rights or environmental protection treaties during an armed conflict should be balanced against that of international humanitarian law. It had not been established that such treaties continued to operate fully during an armed conflict, while international humanitarian law also bound belligerents with provisions on the protection of human rights and the environment. It was noteworthy in its advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons* case the International Court of Justice had held that the question whether the use of certain weapons in warfare constituted a breach of human rights instruments could be decided only by reference to the law applicable in armed conflict and could not be deduced from the terms of the human rights instruments themselves.

37. Draft article 10 and draft article 6, paragraph 1, should be revisited. The former suggested equal treatment for the parties to an armed conflict, regardless of the legality of the use of force, as in the case of international humanitarian law, while the latter implied that a dispute concerning the interpretation or status of a treaty could constitute the basis of an armed conflict, without passing judgement of the legality of such a conflict. A consensus should be reached as to whether States having recourse to the illegal use of force should be differentiated from other States and whether the armed conflicts concerned should conform to international law.

38. With regard to the topic "Diplomatic protection", the significance of the clean hands doctrine was that, where it was applied, a State could not exercise the right of diplomatic protection on behalf of its national if that national had committed a wrongful act. Some commentators had argued that the doctrine was not very different from the general principle of good faith in the context of international relations between States. Moreover, they claimed that the doctrine had little practical effect on the general rules of international responsibility. That argument, however, overlooked the basic nature and function of diplomatic protection. First, the legal fiction of the doctrine was that an injury to a national was an injury to the State itself. The State's exercise of the right of diplomatic protection therefore arose from its inherent right as a State and not its status as an agent of the national. It was thus irrelevant to modern international law to prevent the State from exercising its right owing to a fault of its national. Secondly, there was no clear authority to support the applicability of the clean hands doctrine to cases of diplomatic protection. International courts, including the International Court of Justice, had asserted that the doctrine had no special place in claims involving diplomatic protection. Lastly, the doctrine might be inconsistent with *jus cogens* norms of international law set forth in the Vienna Convention on Consular Relations. If the draft article endorsed the clean hands doctrine, the State's right of consular representation of nationals who suffered injuries in a foreign country might be threatened. The Special Rapporteur had therefore been right to conclude that the doctrine was not applicable because it was not relevant in the context of diplomatic protection and because there was no authority or precedent to support it.

39. **Ms. Schwachöfer** (Netherlands), referring to the topic "Effects of armed conflicts on treaties", said her Government agreed that it would be premature to submit the draft articles to a drafting committee or to establish a working group. It supported the proposition that continuity of treaty obligations in armed conflict should be encouraged in cases where there was no genuine need for suspension or termination, and that, in formulating the draft articles, a pragmatic approach should be taken towards determining whether suspension or termination was actually necessary.

40. With regard to the question whether the draft articles should cover solely treaties in force at the time of the armed conflict or also treaties that had not yet entered into force, since article 25 of the Vienna Convention on the Law of Treaties allowed for the provisional application of treaties, it would seem advisable that the draft articles should apply to treaties that were being provisionally applied.

41. As to the scope of the draft articles, and in particular whether treaties that became operative during an armed conflict should be included, she said that although draft article 7, paragraph 1, was inaccurate because such treaties did not continue in operation during an armed conflict but rather became

operative during such a conflict, it was nevertheless useful to include such treaties within the scope of the draft articles. International humanitarian law treaties covered a wide variety of topics and their provisions should be enforced unless it was genuinely impossible to do so.

42. Further consideration should perhaps be given to the suggestion that the definition of armed conflict contained in draft article 2 (b) should be deleted. States were sometimes reluctant to admit that they were engaged in an armed conflict. Therefore, the existence of an armed conflict should be determined by a legal test applied to the factual situation, and should not be dependent on recognition thereof by the participants. For that reason, it would be useful to include a definition of armed conflict in the draft articles.

43. If the draft articles did include a definition of armed conflict, that definition should also cover non-international armed conflicts, because such conflicts could also affect the ability of a State to fulfil its treaty obligations. The vast majority of armed conflicts were non-international in character, and the draft articles should be drafted in such a way as to foster their applicability. It might be suitable to use the definition formulated by the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case, which was reproduced in paragraph 140 of the Commission's report and had the advantage of covering international as well as non-international conflicts.

44. Since international and non-international armed conflicts tended no longer to be considered fundamentally different, and since many of the norms developed to address international armed conflicts were applicable to non-international armed conflicts, no distinction should perhaps be made between those two types of conflict. Military occupations should be included in the definition, even if they were not accompanied by protracted armed violence or armed operations, because a State under occupation could not always fulfil its treaty obligations. Moreover, such an approach was in keeping with the relevant provisions of international humanitarian law, and in particular the common article 2 of the four Geneva Conventions of 1949, which was *lex specialis* in that field. If such an occupation was sufficient to entail the applicability of the norms relating to armed conflicts, then it would also entail that of the draft articles on the effect of armed conflicts on treaties. In that regard, the Special Rapporteur's decision to invoke international humanitarian law as *lex specialis* in article 5, paragraph 1, was worthy of support.

45. With regard to draft article 3 on ipso facto termination or suspension, her Government supported the suggestion that the position of third parties should be clarified in the text by noting that the ordinary rules of the Vienna Convention on the Law of Treaties such as those relating to fundamental change of circumstance and supervening impossibility of performance would apply. In that regard, the suggestion that the list of treaties expressly applicable in case of an armed conflict should be included in the commentary was worth exploring. Her Government awaited with interest the Special Rapporteur's proposals for redrafting article 10 on the legality of the conduct of the parties.

46. Turning to "Diplomatic protection", she said that her Government generally supported the draft articles on the topic. It had noted that the matter of consular assistance had been excluded from the draft articles, and believed that should be stated explicitly in the commentary, for the sake of clarity. It also fully endorsed the position expressed by the Special Rapporteur in his fifth report, that customary international law rules on diplomatic protection and more recent principles governing the protection of human rights complemented each other and ultimately served a common goal, the protection of human rights (A/CN.4/538, para. 37).

47. In draft article 1, the words "its national" on definition and scope, were restrictive, because the scope was widened in later articles, such as draft article 8 on stateless persons and refugees. Article 3, paragraph 1, might therefore be reformulated in the following way in order to place greater emphasis on the individual: "The State of nationality is the State entitled to exercise diplomatic protection." The position of the individual was also at stake in draft article 5, on continuous nationality. Her Government supported the idea underlying that article, which was to protect the individual against any unfairness that might otherwise occur, and therefore believed that in paragraph 3, "Diplomatic protection shall not be exercised" should be replaced by "Diplomatic protection may not be exercised", since that wording was more in keeping with the discretionary authority of the State with respect to the exercise of diplomatic protection, and with the terminology used in draft articles 7 and 14.

48. Her Government welcomed the inclusion of draft article 8 on diplomatic protection for stateless persons and refugees. Paragraph two of the commentary, concerning the diplomatic protection of refugees, was of particular importance, since protection by the State of residence was crucial for persons who could not or did not want to avail themselves of the protection of the State of nationality, or risked losing refugee status in the State of residence if they did so.

49. Concerning diplomatic protection for legal persons such as corporations, the draft articles might gain from a fresh look at comparative corporate law and current global economic developments. Draft article 9 on the State of nationality of a corporation, as it stood, ruled out the possibility of dual nationality for corporations, but such corporations existed in the Netherlands. Much has been said regarding the extent to which local remedies must be exhausted before diplomatic protection could be exercised. No codification, however, could succeed in providing an absolute rule governing all situations. Her Government therefore suggested adding the following passage in the commentary to article 14: "No Prior exhaustion of local remedies is required for diplomatic action stopping short of bringing an international claim. See Restatement (Third) of the Foreign Relations Law of the United States (1987), paragraph 703, comment d: 'The individual's failure to exhaust domestic remedies is not an obstacle to informal intercession by a state on behalf of an individual.'" With regard to local remedies, no distinction should be made between legal and factual denial.

50. With regard to draft article 17, the words "under international law" should be deleted and the draft article reformulated to read: "The right of States, natural persons or other entities to resort to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, are not affected by the present draft articles."

51. She agreed with the Special Rapporteur on the issue of the clean hands doctrine. The few cases that fell within the scope of diplomatic protection did not constitute sufficient practice to warrant codification, nor could its inclusion be justified as an exercise in the progressive development of international law.

52. **Mr. González-Campos** (Spain) said that the topic "Fragmentation of international law" was, as the Commission itself had admitted, very different from the other topics that the Commission had considered to date. Whereas in the past the Commission had dealt with the codification and progressive development of international law by formulating draft articles on specific areas, under the heading of fragmentation it proposed to undertake an analysis of the international legal system as a whole and to consider the relationship between the various categories of international law. Although the resulting studies would certainly be of great theoretical interest from the standpoint of doctrine, to which it owed its inspiration in any case, the inclusion of such a general and theoretical topic would place the Commission in a complicated position. That was why some members of the Commission and the Sixth Committee had expressed doubts in previous years about the wisdom of taking up the topic.

53. His delegation had reservations both about the choice of the aspects to be studied and about the proposed outcome of the Commission's work. There could be no objection in principle to a study of the relations between general international norms and *lex specialis*, since that issue went to the heart of the problem of the expansion of the international legal system and its consequent potential for "fragmentation". However, the study on hierarchy in international law, or the superior status of certain international rules of law, specifically, *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations, raised problems. The norms mentioned were not homogeneous; obligations *erga omnes* had specific characteristics relating to their function in the international legal system. Although most of the legal literature was in agreement that hierarchy in international law was insufficient, it was doubtful that the Commission could reach satisfactory and generally acceptable results in that area.

54. In addition, the Study Group had decided to examine three aspects of fragmentation related to certain provisions of the Vienna Convention on the Law of Treaties, namely, article 30, article 31, paragraph 3 (c), and article 41. His delegation had serious reservations about the wisdom of addressing those aspects when there were many other questions about the relationship of rules in the international legal system that merited consideration, such as integration, complementarity, substitution or conflict of rules. Moreover, the choice entailed certain risks.

55. His delegation also had reservations about the proposed scope of the outcome of the Commission's work. The intention of the Study Group was to attain an outcome that would be of practical value for legal practitioners and would take the form of a series of studies and a set of conclusions to serve as practical guidelines. The root of the problem for his delegation was the potential scope or effects of the practical guidelines. In order to be of practical value, the guidelines would have to be complete, a goal that would be very difficult to achieve, both with respect to the relationship of general legal norms and *lex specialis* and with respect to the hierarchy of legal norms. If the guidelines turned out to be incomplete, the question arose whether it would be desirable for the General Assembly to recommend them, or whether it would have to limit itself to merely taking note of the Commission's work on the topic.

56. Furthermore, if the practical guidelines were to be an interpretation by the Commission of the aforementioned provisions of the Convention, no doubt a sound one, they might nevertheless fall afoul of article 31, paragraphs 2 and 3, on interpretation of a treaty. They would not be part of the context of the treaty (paragraph 2) or any of the supplementary means of interpretation indicated in paragraph 3, being neither a subsequent agreement between the parties regarding the interpretation of the treaty, nor subsequent practice in the application of the treaty, nor yet relevant rules of international law applicable in the relations between the parties. To put it simply, the practical guidelines would have nothing to do with the parties and would have a very uncertain status.

57. There was also a risk that the practical guidelines as applied by States after their adoption could result in subsequent practice that might lead to a partial modification of the rules contained in the Vienna Convention, a result that did not appear desirable. The possibility of the modification of treaties by subsequent practice had been proposed in article 38 of the draft articles on the law of treaties adopted by the Commission, but had been rejected by the United Nations Conference on the Law of Treaties as creating uncertainty in treaty relations. That danger might not have been taken into account by the Study Group, since it was proposing to supplement the provisions of the Vienna Convention on the issue of "inter-temporality" with reference to article 31, paragraph 3 (c), and with respect to cases not contemplated in article 30. The question should be asked whether the practical guidelines, if States applied them, would not modify the provisions of the Vienna Convention, even if only by way of supplementation.

58. Those were his delegation's chief reservations as the Commission entered into the *terra incognita* of formulating "practical guidelines" rather than draft articles, and it would be looking closely at the outcome of the Commission's work when it was presented the following year to see whether its concerns had been addressed.

59. **Mr. G. P. Singh** (India) commended the Commission's progress on the topic "Responsibility of international organizations" and concurred with the Special Rapporteur that a wrongful act of an international organization could consist of either an act or an omission. Article 8, paragraph 2, raised the controversial issue of whether all obligations originating in the rules of an organization were to be deemed international obligations. His Government took the view that the paragraph in question would not apply to rules which were merely procedural or administrative in nature. In some cases, determination of the responsibility of the organization on the basis of its own rules would lead to the conclusion that the member States which established the organization's policy bore collective responsibility.

60. Article 15 covered some complex and overlapping issues. It would be necessary to study precedents carefully when deciding whether to pin responsibility on an international organization if it required its member States to commit an internationally wrongful act. Article 15, paragraph 1, posed the question whether a decision of an international organization binding a member State to commit an act that would be internationally wrongful if committed by the organization itself would completely exonerate that State. That was a matter which required further in-depth examination. Logically, action taken by a State at the behest of an international organization that breached the international legal obligations of the State and the organization should attract the responsibility under international law of both the organization and the State. Article 15, paragraph 2, also necessitated much reflection owing to the diversity of international organizations and their mandates.

61. Furthermore, the complex nature of international organizations and their differing mandates made

generalization impossible. It might be wise for the General Assembly to follow the course of action it had pursued in respect of the articles on Responsibility of States for Internationally Wrongful Acts, in other words it could take note of the draft articles on the responsibility of international organizations, but not adopt them as a binding legal instrument. The Commission should be wary about drawing inappropriate analogies with State responsibility in an effort to develop principles applicable to international organizations.

62. With regard to the topic "Shared natural resources" one of the difficulties inherent in the draft articles on transboundary aquifers proposed by the Special Rapporteur in his third report (A/CN.4/551 and Corr.1 and Add.1) was that they were modelled on the provisions of the 1977 Convention on the Non-navigable Uses of International Watercourses, which dealt with surface waters and not groundwaters. Moreover, the draft articles were not supported by sufficient State practice. It would be inappropriate to apply the principle of equitable use, which was embodied in the 1977 Convention when devising a groundwater regime, because riparian rights played a less pronounced role as far as water utilization was concerned.

63. Draft article 5 appeared to be similar to article 5 of the 1977 Convention, which had posed problems during the negotiation of the Convention on account of the twin principles of equitable utilization and reasonable utilization. It might therefore be inadvisable to apply those two principles to groundwaters. Since much still needed to be learned about transboundary aquifers, their widely differing characteristics and variations in State practice, context-specific agreements and arrangements would be the best way to handle questions related to transboundary aquifer systems. Such an approach would enable the States concerned to take appropriate account of any other relevant factors. For that reason, it would be preferable to draw up guidelines which could be used during the negotiation of bilateral or regional arrangements, rather than drafting a universally binding legal instrument.

64. Concerning the topic "Effects of armed conflicts on treaties", the Special Rapporteur had been right to seek, through the draft articles he had produced (A/CN.4/552), to foster the security and stability of legal relationships between States thereby limiting the occasions on which the incidence of armed conflicts had an effect on treaty relations. Nevertheless, since the subject was dominated by doctrine and practice was sparse, it would be necessary to study State practice in a variety of legal systems before any acceptable standards could be identified. The definition of "armed conflict" in draft article 2 called for careful examination. Draft article 7 was likewise controversial and not rooted in State practice. It would be difficult to reach consensus on the indicative list of treaties which would remain in operation during an armed conflict; moreover, no such list was necessary. The whole topic was still at a formative stage. Hence more research and analysis were required in order to grasp the full import of the subject matter.

65. **Ms. Kamenkova** (Belarus), welcoming the work of the Commission and the Special Rapporteur on the topic "Effects of armed conflicts on treaties", said that her delegation agreed that the outbreak of an armed conflict did not ipso facto terminate or suspend the operation of treaties. At the same time, the nature and extent of an armed conflict often made the implementation of such treaties impossible in practice. However, that fact should not create legal grounds for a decision to suspend or terminate a treaty during an armed conflict.

66. Her delegation favoured using the criterion of the intention of the parties at the time a treaty was concluded to determine the susceptibility of the treaty to termination during an armed conflict. However, the criterion should be less subjective and should be based on the express intention of the parties.

67. In its work on the topic, the Commission should adhere to the basic principle *pacta sunt servanda*. States generally had an interest in maintaining the stability of treaty relations. Therefore, the effects of armed conflicts on treaty relations, particularly those between the parties to an armed conflict and third States, should be minimized.

68. Her delegation welcomed draft article 7, which related to categories of treaty whose object and purpose involved the necessary implication that they continued in operation during an armed conflict. She proposed that the Commission should consider including the Charter of the United Nations, in particular Article 103 thereof, in the list contained in paragraph 2 of the draft article. Such a reference would emphasize the Charter's special status as a fundamental international legal instrument.

69. With a view to gathering information from a majority of States about their practices and opinions with regard to the topic, it would be useful for the Commission to circulate a questionnaire on the main aspects of the draft articles so as to improve the quality and universality of its codification work.

70. Turning to the topic "Diplomatic protection", she welcomed the progress made but said that the Commission should not limit itself to consideration of the conditions for the exercise of diplomatic protection, specifically the nationality of claims and the exhaustion of local remedies. It would be appropriate to analyse the practical issues of ways of exercising diplomatic protection and principles for the distribution among injured individuals of compensation received by States as a result of the settlement of mass claims. The further codification and development of the rules on diplomatic protection should be aimed at making the relevant provisions of the articles on Responsibility of States for Internationally Wrongful Acts specifically applicable to diplomatic protection.

71. Her delegation supported the proposal of the Special Rapporteur in his sixth report (A/CN.4/546) that no provision dealing with the clean hands doctrine should be included in the draft articles, since the doctrine was not directly linked to the topic of diplomatic protection. The Commission should also reject the dogmatic use of the *Mavrommatis* principle as a basis for the clean hands doctrine. That principle was not fully consistent with contemporary international law, which focused on protection by the State of its nationals and legal persons rather than on the restoration, by means of diplomatic protection, of a right of the State that had been violated by another State through improper treatment of such nationals or legal persons. The State should have unlimited freedom to exercise its discretionary right to exercise diplomatic protection.

72. Her delegation also opposed the inclusion of the clean hands criterion on the grounds that, in many cases, it could not be established prima facie. The permissibility of exercising diplomatic protection should not depend on circumstances that could be objectively established only at the stage of examination of the merits. Moreover, it was unlikely that the clean hands criterion could be objectively applied in bilateral relations between States in all cases. Abuse of the criterion might result in the exercise of diplomatic protection becoming impossible in cases involving a reaction to violations of the Vienna Convention on Consular Relations.

73. In addition, the significance of clean hands criterion lay in the fact that it was a circumstance which attenuated or aggravated international legal responsibility. It was only indirectly related to diplomatic protection. The possibility of a State defending the interests of one of its own nationals or legal persons should not be linked to the absolute irreproachability of the conduct of that natural or legal person. Legal disputes usually arose from situations in which both parties had caused each other harm and it was unclear which party bore the greater legal responsibility. Lastly, for some States, recognition of the applicability of the clean hands doctrine in the context of diplomatic protection could mean restriction of the constitutional right of their nationals to protection in a foreign State. Belarus was among those countries that guaranteed protection for its nationals in foreign States under the Constitution.

74. With regard to the topic "Unilateral acts of States", she welcomed the fact that the Commission, after a long period of doubt as to the possibility of effective codification of the rules on such acts, had embarked on an in-depth analysis of the topic. In its future work, the Commission should ensure that a clear distinction was drawn between unilateral legal acts and political statements. Her delegation agreed that the freedom of States to make political statements without legal consequences should be preserved.

75. The Commission should not, at the current stage, concern itself with conduct of a State that might produce legal effects, but rather should focus on unilateral acts *stricto sensu*, i.e. written or oral statements expressing the intent of a State. Her delegation endorsed the view that unilateral legal acts should be performed in good faith by the States that formulated them. Such acts could be terminated by States only by agreement with subjects of international law that had taken note of them and modified their conduct accordingly.

76. **Mr. Nesi** (Italy), noting that the Special Rapporteur for the topic "Effects of armed conflicts on treaties" had concluded, with a somewhat abstract reference to the intention of the parties, that as a general rule armed conflict did not have the consequence of terminating or suspending the operation of a treaty, said that a more nuanced

approach should be taken to the question of the suspension of the operation of a treaty. The implementation of a number of categories of treaty was often rendered difficult when there was armed conflict between the parties.

77. A clear distinction should be drawn between the effects of armed conflict on relations between States that were parties to the conflict and on relations with a third State. Although article 73 of the Vienna Convention on the Law of Treaties used the term "outbreak of hostilities between States", which might cover both those cases, the question of the effects of hostilities with regard to a third State not a party to the conflict probably did not call for special rules, since the law of treaties already provided grounds for termination or suspension of the operation of a treaty, such as a supervening impossibility of performance or a fundamental change of circumstances. With respect to the effects as between States parties to a conflict, the Commission should examine State practice thoroughly, including practice during the Second World War, and should analyse the jurisprudence of a large number of countries.

78. **Mr. Tavares** (Portugal) said that his delegation appreciated the efforts of the Special Rapporteur to present a full picture of the topic "Effects of armed conflicts on treaties" in 14 draft articles. Draft article 1 posed no problems, but the definitions of the terms "treaty" and "armed conflict" in draft article 2 called for comment. Draft article 1 limited the sense of "treaty" to an agreement between States, whereas that question was not prejudged in the 1969 and 1986 Vienna Conventions. His delegation therefore questioned whether a broader definition could not be used or, more pragmatically, whether a definition was really necessary.

79. With regard to the proposed definition of "armed conflict", he pointed out that the Vienna Conventions referred to the "outbreak of hostilities". Moreover, the definition proposed seemed somewhat out-of-date; it did not reflect, for example, the broader notion of conflict reflected in chapter IV of the report of the High-level Panel on Threats, Challenges and Change (A/59/565). If a definition was necessary, and it might not be the best option, a broader definition might be better, so that the party applying the draft articles might determine on a case-by-case basis the kind of hostilities that could have an effect on a given treaty. Moreover, it was yet to be determined whether the draft articles fell under the general heading of the law of treaties or the law on the use of force. Careful consideration would have to be given to which set of general principles of law would inform the draft articles and the role of customary law in each field.

80. In draft article 3, the Special Rapporteur proposed to replace the earlier position, according to which armed conflict automatically abrogated treaty relations, by a more contemporary view, according to which the outbreak of armed conflict did not ipso facto terminate or suspend treaties in force between the parties to the conflict. His delegation was yet to be convinced that such a change had taken place in the views of the international community. The parties to an armed conflict were obviously not in a position to comply with the rules of a treaty concluded with the enemy. Even if there were convincing practice as to the continuity of treaties, a general principle of continuity in such cases seemed unrealistic. As the Special Rapporteur himself recognized, draft article 3 might not be strictly necessary.

81. The first three draft articles alone raised three questions of major importance. The first, already mentioned, was whether the topic belonged under the law of treaties or the law of armed conflict; that decision was crucial. The second concerned the traditional idea that, since resort to war between States, being illegal, fell outside an international law framework, treaties were excluded from armed conflict discussions; hence, any attempt to move into new fields required a cautious approach. Third, his delegation had doubts concerning the utility of the topic. It seemed that the 14 draft articles represented, not codification or even progressive development of international law, but outright innovation.

82. The text of the draft articles on diplomatic protection adopted on first reading in 2004 would serve as an excellent basis for the further work of the Commission on the topic. His delegation intended to submit written comments as the Commission had requested. It agreed with the approach taken by the Special Rapporteur with regard to the clean hands doctrine.

83. His delegation welcomed the innovative approach the Commission was taking to the topic "Fragmentation of international law", which could result in a significant contribution to the progressive development of international law. It looked forward to

the presentation in 2006 of a consolidated study accompanied by a set of conclusions, guidelines and principles.

84. **Mr. Fitschen** (Germany), referring to the topic "Fragmentation of international law", said that the studies the Commission had already considered and those to be taken up by the Study Group in 2006 presented a thought-provoking assessment of current legal thinking on the topic. His delegation commended the Commission for its intention to conclude work on that topic at its next session, and to achieve a concrete outcome of practical value for practitioners and legal experts; it looked forward to receiving the envisaged set of practical guidelines.

85. With respect to the report of the Study Group, and in particular the question of the "disconnection clause" his delegation did not agree that the effect of both the European Community and its member States becoming parties to the same international treaty was a negative phenomenon or that it led to the fragmentation of international law. As the example given in paragraph 463, footnote 373 of the Commission's report clearly showed, such a clause applied only in cases where the scope of application of the treaty provisions coincided with that of the relevant Community law. From the point of view of third States, it might, admittedly, be difficult in practice to determine whether the European Community was applying the treaty or the applicable Community law. But in legal terms that did not call into question the scope or applicability of the treaty as such, and therefore should not be a cause of concern to the other parties to that treaty. His delegation saw no legal reason why the European Community and its member States should be precluded legally from proposing such a clause for inclusion in a treaty, or why third parties should object to its inclusion.

86. **Mr. Peh** (Malaysia), referring to the topic "Reservations to treaties", said that his Government favoured the practice whereby a State objected to a reservation that it considered incompatible with the object and purpose of the treaty, but did not oppose the entry into force of the treaty between it and the reserving State. The objecting State would thus notify the reserving State of its position in relation to the legal status of the reservation. If the reservation was incompatible with the object and purpose of the treaty, it would be ineffective irrespective of whether a State objected to it. A reservation would, however, be effective vis-à-vis the objecting State if it was not incompatible with the object and purpose of the treaty and was permitted or not prohibited by the treaty.

87. Turning to the draft guidelines, he proposed that the title of draft guideline 3.1 should be changed to "Formulation of reservations" in order to conform to article 19 of the Vienna Convention on the Law of Treaties. Paragraph 39 of the Special Rapporteur's report (A/CN.4/558) cited a statement by Sir Ian Sinclair to the effect that article 12 of the Geneva Convention on the Continental Shelf did not provide for specified reservations, even though it might have specified articles to which reservations might be made. Malaysia considered, however, that that article was an example of a specified reservation in conformity with draft guideline 3.1.2 on definition of specified reservations, since it expressly authorized reservations to specific provisions and stipulated the conditions that had to be met for the formulation of a reservation. His Government therefore sought further clarification a. to the distinction between "specified reservations", mentioned in draft guideline 3.1.2, and "non-specified reservations authorized by the treaty", mentioned in draft guideline 3.1.4.

88. Draft guideline 3.1.7 was an unacceptable extension of article 19 (c) of the Vienna Convention: a reservation worded in vague, general language which did not allow its scope to be determined was not necessarily incompatible with the object and purpose of the treaty.

89. In draft guideline 3.1.10, the words "essential rights and obligations arising out of that provision", should be replaced by the words "object and purpose of the treaty", and the word "provision" in the second sentence should be replaced by the word "treaty", in order to conform to article 19 (c) of the Vienna Convention. Draft guideline 3.1.12 could be deleted on the ground that there should be no distinction between reservations to non-human rights treaties and human rights treaties. Such a distinction would not promote clarity in that area of law but would instead cause further confusion by offering different standards of compliance for reservations to different types of treaty.

90. Draft guideline 3.1.13 should be amended by deleting paragraphs (i) and (ii), since reservations to dispute settlement clauses had consistently been found not to be contrary to the object and purpose of a treaty within the case law of the International Court of

Justice. Furthermore, the meaning of paragraphs (i) and (ii) was unclear. His Government therefore proposed that the draft guideline should be revised to read as follows: "A reservation to a treaty clause concerning dispute settlement or the monitoring of the implementation of the treaty is not incompatible with the object and purpose of the treaty."

91. Although the draft guidelines were a step towards clarifying the concept of reservations to treaties, they required further discussion and comments from Member States and additional in-depth analysis from the Commission before adoption would be possible.

92. Turning to the topic "Unilateral acts of States", he said that his Government wished to reiterate its support for the continuing efforts of the Commission to identify principles or guidelines on unilateral acts of States that created legal obligations. Malaysia had taken note of the diverse views expressed on the feasibility of establishing a regime governing universal acts. It would be beneficial to establish such principles or guidelines prior to embarking on an ambitious endeavour to codify such acts. On the issue of whether a statement created legal obligations or was merely political in nature, his Government agreed that the intention of the State was an important determining factor, alongside purpose, context, circumstances, and content and form. With regard to form, both written and oral statements could entail legal obligations.

93. While recognizing the difficulty of the task that lay ahead, Malaysia valued the concerted effort the Commission had been making to obtain and analyse State practice in that area. The Commission should formulate concrete principles and guidelines on unilateral acts of States that created legal obligations before looking into the possibility of drafting legal rules for such acts.

94. **Mr. Currie** (Canada) said that his Government agreed with the Special Rapporteur for the topic "Diplomatic protection" that the clean hands doctrine should not be included in the draft articles approved by the Commission in 2004. The status of that doctrine in relation to diplomatic protection was at best inconclusive in customary law. From a practical point of view, moreover, its application in relation to the admissibility of diplomatic protection would weaken the universal application of human rights protection. Diplomatic protection was an important instrument in the protection of human rights, and making it dependent on the conduct of a particular State or individual would be detrimental. The doctrine should more appropriately be raised at the merits stage, since it related to attenuation or exoneration of responsibility rather than to admissibility. Canada therefore supported the approach taken by the Special Rapporteur in his report (A/CN.4/546).

95. Canada's policy was to provide diplomatic protection to Canadian citizens regardless of any other nationalities they might possess. Canada rejected the notion that a State of nationality could not exercise diplomatic protection for a person in respect of a State of which that person was also a national. It therefore welcomed draft article 7, which correctly moved away from that notion and provided for the exercise of diplomatic protection when the nationality of the individual was predominant in relation to the State invoking such protection. That policy was in step with contemporary reality: many individuals possessed multiple nationalities and their human rights were given legal protection against the State of which they were nationals.

The meeting rose at 12.15 p.m.

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Held at Headquarters, New York, on Wednesday, 2 November 2005, at 9.30 a.m.

Chairman: Mr. Zyman (Vice-Chairman) ..... (Poland)
later: Mr. Yañez-Barnuevo (Chairman) ..... (Spain)

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In the absence of Mr. Yañez-Barnuevo (Spain), Mr. Zyman (Poland), Vice-Chairman, took the Chair.

The meeting was called to order at 9.35 a.m.

Agenda item 80: Report of the International Law Commission on the work of its fifty-seventh session (*continued*) (A/60/10)

1. **Mr. Lavalle-Valdés** (Guatemala) said that the reference in article 4, paragraph 2 (a), of the draft articles on the effects of armed conflicts on treaties, to provisions of the Vienna Convention on the Law of Treaties gave the impression that the "intention" referred to in the draft article related to the interpretation of the treaty. That would be the case where the treaty expressly or implicitly indicated the intention of the parties concerning the termination or suspension of the treaty in the event of an armed conflict. Generally speaking, however, treaties contained no reference, even implicitly, to such an eventuality. Surely, in such cases, the very attempt to ascertain the effects of the armed conflict on the treaty amounted to an interpretation of the treaty. Thus, if the object of the treaty was the sale of ships, for example and the treaty, while indicating the price, made no reference to delivery or payment methods, any resort to the travaux préparatoires or the circumstances of the conclusion of the treaty in order to resolve such issues, was tantamount to an interpretation of the treaty, using the means laid down by the Vienna Convention.

2. By contrast, where there was agreement on all the elements essential to the operation of the treaty, but the parties wished to determine the status of an additional feature which related to the treaty but did not constitute an essential element, any action taken to determine such a feature did not constitute interpretation. Thus, to revert to the example of a treaty under which one State sold ships to another, it might be necessary to establish whether the parties had agreed that, in the event of a ship sinking after its delivery by the first State, the vendor was obliged to replace the lost ship by another at the same price and on other previously agreed conditions. In that case, the action taken to ascertain whether there had been such an agreement between the parties was in no sense an interpretation of the treaty, since all that needed to be established was whether an additional agreement had been made or not.

3. Similarly, in the case of a treaty which, as usually happened, contained no provision concerning the question of whether it would operate or not in the event of an armed conflict between the parties, the action that needed to be taken to ascertain whether there had been an agreement in that regard between the parties again could not be considered interpretation of the treaty, whether or not the travaux préparatoires of the treaty were consulted.

4. He therefore proposed that, in the interests of giving draft article 4 more clarity and force, the existing text should be replaced by provisions worded along the following lines:

> "1. Where a treaty indicates the intention of the parties relating to the termination or suspension of the treaty in case of an armed conflict, or where such intention may be deduced from the interpretation of the treaty, that intention shall stand.
>
> 2. In any other case, the intention of the parties to a treaty with regard to its termination or suspension in case of an armed conflict shall, in the event of disagreement between the parties in that regard, be determined by any reasonable means, which may include the travaux préparatoires of the treaty or the circumstances of its conclusion.
>
> 3. The foregoing shall be without prejudice to any decision that the parties may, by mutual agreement and without a breach of *jus cogens*, make at any time."

5. **Ms. Woollett** (Australia) said that the draft articles on the effects of armed conflicts on treaties represented a useful basis on which to begin the debate on the topic. Her delegation strongly agreed with the Special Rapporteur's suggestion that the Commission should not attempt to embark on a comprehensive definition of armed conflict in draft article 2. It also agreed that a possible solution might be to adopt a simpler formulation, stating that the articles applied to armed conflicts, whether or not there had been a declaration of war.

6. Her delegation shared the concerns expressed by other States about draft article 4. Since, when negotiating treaties, States did not usually consider the effect that going to war might have on a given treaty, their intention in that regard might be absent or difficult to prove. The question of intention — and other possible criteria — should be examined further.

In particular, it would be important to ensure that any criteria on termination or suspension set out in the draft articles conformed to the Vienna Convention on the Law of Treaties.

7. Draft article 7 would prove highly controversial, given its attempt to outline the categories of treaty that were likely to remain in force during armed conflicts. She noted that the list was intended to be indicative rather than exclusive in nature.

8. Her delegation welcomed the decision to include the topic "The obligation to extradite or prosecute (aut dedere aut judicare)" in the Commission's programme of work. The principle was of critical importance in ensuring effective action against criminal acts, as highlighted in the Committee's recent work on the scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel and the draft comprehensive convention on international terrorism.

9. Her delegation would welcome final reports by the end of the quinquennium on several topics, especially the draft articles and commentary on diplomatic protection. It hoped that the second reading of the draft articles would be completed during the fifty-eighth session of the Commission and submitted to the General Assembly in 2006.

10. **Mr. Al-Jadey** (Libyan Arab Jamahiriya), referring to the topic "Shared natural resources", stressed the importance of making explicit reference in the draft articles to General Assembly resolution 1803 (XVII) concerning permanent sovereignty over natural resources. The Commission's work on groundwater should avoid ambiguity, particularly as the draft articles drew heavily on the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, which thus far had failed to win full international acceptance. Bilateral and regional arrangements played an important role and with regard to groundwaters the term "arrangements" as contained in draft article 3, should be construed as meaning an optional course of action which States pursued of their own volition.

11. The draft articles on the responsibility of international organizations, were satisfactory, particularly draft article 1, which did not confine itself to enumerating internationally wrongful acts on the basis of the principle of *nullem crimen, nulla poena sine lege*, but offered greater flexibility in addressing conduct by organizations of which the international organization that incurred responsibility was a member. With regard to the Commission's request for comments on specific issues relating to the topic (A/60/10, para. 26), it would be desirable to include in the draft articles provisions on the responsibility of international organizations for decisions taken on the basis of direction, control or coercion.

12. With regard to the topic "Diplomatic protection", the purpose of such protection was to remedy any injury done to a national of the applicant State. The concept differed from that of diplomatic protection as a means of preventing injury. Agreement on that concept would help the Commission to avoid further confusion on the action to be taken by States wishing to protect their nationals. In that regard, the *Mavrommatis* principle should not be extended, since it would dilute the rule on the exhaustion of domestic remedies.

13. The draft articles adopted on first reading dealt only with the conditions for the exercise of diplomatic protection, but gave no guidance on important questions such as who could exercise such protection; how it should be exercised; and what its consequences were. Draft article 16, paragraphs (a), (b) and (c), negated draft articles 14 and 15, since the wording was very loose and open to wide interpretation. Since the purpose of the rule on the exhaustion of legal remedies was to spare States from having to defend themselves before an international body with respect to any acts attributed to them, whenever domestic remedies were available, the introduction of conditions and exceptions to that rule could be used to avoid complying with the rule itself. Draft article 17 should be interpreted as referring not to coercive measures such as the imposition of protection by means of force or the application of mandatory penalties or selective measures, but rather to actions or procedures regulated by bilateral, regional or international treaties.

14. Concerning the topic "Expulsion of aliens", the terms "alien" and "expulsion" must be defined more precisely. In particular, the draft articles should focus on the reasons for expulsion. The Special Rapporteur should review State practice and national legislation in order to elaborate an international instrument that would win universal support. The Commission's study on unilateral acts of States had encountered numerous difficulties, not least of which was the definition of the topic itself. There was also considerable confusion over the purpose of the study and much work was

needed to address the many contradictions which the study had brought to the fore.

15. Since unilateral acts were usually a means of achieving political ends, their legal effects did not necessarily reflect their true nature. The ambiguities inherent in certain types of unilateral act often made it difficult to distinguish between a political act and a legal act. The assumption that a unilateral act was the expression of the free will of a State was flawed, since the term "unilateral act" covered a wide range of legal relations. Furthermore, the term "conduct" encompassed both action and inaction: acquiescence for example, was regarded as an act. The fact that some unilateral acts could have binding legal effects for other parties added to the difficulty of examining them with a view to their codification. The study of unilateral acts should take account of the different forms such acts could take, as well as other forms of unilateral acts that States might reform in the future. It should also take account of the disjunction between the form and the substance of a unilateral act, since the form did not always faithfully reflect the substance.

16. **Mr. Makarewicz** (Poland) said that the quality of the Special Rapporteur's first report on the effects of armed conflicts on treaties (A/CN.4/552) and the extraordinary speed with which it had been prepared had given the Commission a very solid basis for its work on the topic. He also commended the memorandum prepared by the Secretariat (A/CN.4/550 and Corr.1), which constituted a factual and legal treasury for further work.

17. The value of the report was greatly enhanced by the formulation of draft articles. The fact that they were intentionally provisional — many being based on provisions adopted by the Institute of International Law in its resolution II of 1985 entitled "The effects of armed conflicts on treaties" — gave the Commission an opportunity to develop the topic further. Commendable though they were, it was too soon for the draft articles to be transmitted to the Drafting Committee.

18. Draft article 2 put forward a wider definition of "armed conflict" to include both international and non-international conflicts. In principle, that approach was acceptable, but, in practice, it might give rise to problems relating to the qualification of certain specific situations, which might or might not be covered by the draft articles. Draft article 3 likewise posed a problem with its categorical statement that the outbreak of an armed conflict did not ipso facto terminate or suspend the operation of treaties. The Special Rapporteur himself had recognized the problem and proposed to replace the term "ipso facto" with the word "necessarily". While endorsing the proposed modification, his delegation noted that, in certain situations, the outbreak of an armed conflict might indeed cause the termination or suspension of a treaty ipso facto (or, perhaps, per se), for example in the case of a bilateral political or military alliance treaty. It could surely not be said that the Molotov-Ribbentrop pact had not terminated on the outbreak of war between Germany and the Soviet Union in 1941. Some additional elaboration was required to cover exceptional but possible situations.

19. Draft article 7 required further analysis. First, the Commission should check whether the catalogue of treaties continuing in operation during an armed conflict was complete and exhaustive. The memorandum by the Secretariat already contained suggestions for extending the catalogue. Moreover, such categories as "multilateral law-making treaties" should be made more specific. Perhaps, indeed, there was no need for the catalogue at all. Meanwhile, his delegation was pleased to note that the Special Rapporteur himself had acknowledged the need to give greater prominence to the possibility of separability of treaty provisions in the draft articles.

20. His delegation shared the Special Rapporteur's doubts as to whether it was necessary to introduce more detailed provisions concerning the legality or illegality of an armed conflict in connection with its effect on treaties. The Commission should consider the matter with particular care, bearing in mind the need to avoid, as far as possible, any politicization of its work. It should also avoid entering areas where other international bodies were primarily competent. The wording of draft article 10 therefore seemed the most appropriate. With regard to the scope of the draft articles, his delegation considered that extending it to cover treaties concluded with international intergovernmental organizations would be more ambitious and appropriate, although more complicated and difficult.

21. The work done on the topic "Fragmentation of international law", including the three reports considered at the fifty-seventh session and that considered at the fifty-sixth, meant that there was a

good chance that the Commission could finalize its work within the current quinquennium. The topic was undoubtedly a specific one. Being in the nature rather of research than of codification, it had been initially planned that the final result would take the form of a report or reports. There seemed, however, to be a movement in the Commission tending to the elaboration of general guidelines. His delegation endorsed that position.

22. **Mr. García Del Toro** (Cuba), referring to the preliminary report on the expulsion of aliens (A/CN.4/554), said that the term "expulsion of aliens" in its widest sense formed a suitable basis for the Commission's work. While it was a State's sovereign right not only to expel an alien whose presence was deemed undesirable or unacceptable, but also to refuse the admission of aliens to its territory, the expulsion process must be conducted in accordance with the procedures laid down by the law of the country in question and with international legal standards protecting the rights of such persons. The Special Rapporteur ought to examine all the legal consequences of expulsion in terms of the responsibility of the expelling State and the awarding of damages to persons who had been unlawfully expelled or expelled, in a manner contrary to international legal norms.

23. While "collective expulsions" were prohibited, it should be borne in mind, in the codification process, that bilateral agreements between States on the return of illegal immigrants should be regarded as legitimate sources of law. Consequently, the return of groups of aliens to their country of origin, from which they had unlawfully emigrated should, under no circumstances, be regarded as "collective expulsions". It was necessary to ensure that expellees did not remain in legal limbo because they were unable to find a territory in which they could settle. It might be possible to contemplate returning them to the country from which they had entered the territory of the expelling State. In many cases, such persons had spent a long time in a State other than that of their nationality, or had even become nationals of another State. They might have committed crimes, or be involved in situations with specific legal implications in that third State to which they should be answerable.

24. The tenth report on reservations to treaties (A/CN.4/558 and Add.1) demonstrated the breadth and depth of the Commission's work on that topic. Reservations to international treaties were an effective and necessary means of ensuring the universality of intentional treaties in a world which was increasingly interdependent, yet still full of political diversity and where national legal orders varied greatly. Reservations to treaties were a manifestation of the will of sovereign States and offered negotiating flexibility to States which sought to reconcile international legal thinking with their national legal systems. Calling into question the reservations regime established under the 1969 Vienna Convention on the Law of Treaties would result in placing excessively narrow limits on the admissibility of reservations, parties' freedom of consent and the supplementary nature of reservations which, in the final analysis, was determined by the will of States. Since the universality and balance of the Vienna regime was completely acceptable, there was no need to amend the pertinent provisions of the 1969, 1978 and 1986 Vienna Conventions.

25. The right to assess the compatibility of a reservation with the treaty in question, especially in the case of reservations prohibited by that treaty, belonged solely to the States parties and must not be given to the depositary. Such a transfer would constitute interference in the rights of the States parties. Nevertheless, the depositary played an essential role in the application of multilateral treaties inasmuch as it was obliged to discharge its duties in an impartial manner.

26. It would be useful to invite the human rights treaties bodies to the Commission's fifty-eighth session in order that the Commission might hear their views, even though it was not incumbent upon those bodies to pronounce upon the necessity of reservations. Their duty was to promote the acceptance and implementation of human rights instruments on the basis of the principle of free consent of the parties and of the parties' supervision of the work of those bodies.

27. With regard to the topic "Diplomatic protection", the Commission should move towards the adoption of a convention on diplomatic protection through the codification of norms which were accepted in practice, rather than through the progressive development of new norms which did not enjoy the wide approval of States. Diplomatic protection should continue to be a discretionary right of States and not an international obligation for them. It was primarily for a State to decide if it wished to take up the cause of one its nationals who claimed that he or she had suffered

injury as a result of an internationally wrongful act on the part of another State. Similarly, a State should seriously consider whether to grant diplomatic protection to its nationals in the event of the alleged existence of wrongful acts against them carried out by another State. States should evaluate the particular circumstances in which the acts had taken place, together with all aspects of the conduct of their nationals, before deciding to exercise protection or to embark on international litigation. It should also be stressed that diplomatic protection should be exercised solely by peaceful means in compliance with international law. Diplomatic protection involving the use of force was never permissible.

28. The Commission's future work on the formulation of exceptions to the principle that a State could not exercise diplomatic protection on behalf of one of its nationals unless the latter had exhausted domestic remedies should seek to prevent disparate interpretations leading to the improper application of that rule.

29. **Mr. Hmoud** (Jordan) said that producing a set of draft articles on the effects of armed conflicts on treaties was not a straightforward exercise consisting merely in the codification of long-standing rules of customary international law. On the contrary, it entailed the examination of the conflicting evidence of State practice and an endeavour to deduce what principles governing treaty relationships during exceptional circumstances were generally accepted by States.

30. In the modern world, with its system of multilateral relations, there was no longer any legal justification for derogations from the rule of law during an armed conflict. Treaty relations, even in such exceptional circumstances, should be governed by international law. Having established that principle, it was necessary to look at the various doctrines which conformed to it and then at all the relevant elements which had to be taken into consideration, including the nature and scope of the conflict, the content of treaty rules affected by the conflict and the intent of the parties to the treaty.

31. The topic was distinct from that of the legality of the use of force. If the rules of international law did not prohibit termination or suspension of a treaty, the exercise of that right should not be affected by the legality or otherwise of the use of force. If the draft articles created a link between the legality of the use of force and the right to suspend or terminate a treaty that would prejudge the issue of whether certain United Nations bodies were competent to rule on the application of treaties.

32. With regard to the draft articles themselves, in the context of draft article 1, it would be wise to examine the possibility of including within their scope treaties to which international organizations were parties. Such organizations were affected by the application of treaties in wartime and a State or the organization itself might incur responsibility as a result of the wrongful suspension or termination of certain treaty obligations.

33. Draft article 2 should contain a simplified working definition of the term "armed conflict" which did not, at the current stage, draw a distinction between international and non-international armed conflicts. The definition of an armed conflict should make no reference to the "nature or extent" of armed operations: that element should be an independent factor for determining whether treaties could be terminated or suspended if an armed conflict erupted.

34. Draft article 3 might prove useful if the determination, pursuant to article 4, whether a treaty was susceptible to termination or suspension in the event of an armed conflict was inconclusive. Article 3 would tend to keep the treaty in operation. The test of intention embodied in draft article 4 was important. Treaty obligations were contractual obligations and the intent underlying a contract had a bearing on the extent and manner of its operation. Moreover, the provisions of the Vienna Convention on the Law of Treaties regarding interpretation applied to the operation of a treaty as much in wartime as in peacetime. If the treaty's terms did not indicate that its drafters specifically intended the treaty to be susceptible to suspension or termination if a war started, the treaty was presumed to remain in operation in wartime. The nature and extent of an armed conflict had nothing to do with the intention of the drafters of a treaty. It would be worthwhile exploring the "nature" of the treaty in question, because it was an objective criterion facilitating the determination process. It might also be wise to re-examine the approach adopted in draft article 7. Lastly, draft article 11 might trigger controversy over whether the Security Council could order the termination or suspension of treaty obligations. It was to be hoped that the draft articles would not go into that matter.

35. **Ms. Dascalopoulou-Livada** (Greece) said that, although in many cases State practice in connection with the effects of armed conflicts on treaties dated back to the early 1950s, the Commission should make a thorough analysis of that practice and of the relevant jurisprudence. Her Government supported the general thrust of the draft articles, which would promote the continuity of treaty obligations in times of armed conflict when there was no genuine need for the suspension or termination of the treaty. Nevertheless it believed that the effect of an armed conflict on a treaty would very much depend on the specific provisions of that treaty, its nature and the circumstances in which it had been concluded. While the indicative list of treaties which would remain in operation throughout an armed conflict was useful, it required further elaboration. The Special Rapporteur had wisely placed the draft articles within the context of the Vienna Convention on the Law of Treaties, but a textual reference to particular articles of the Convention might not always be appropriate.

36. The criteria for defining the term "armed conflict" set out in draft article 2 were useful, although they might lend themselves to subjective interpretation. If there was to be a definition, it should include non-international armed conflicts, as they, too, could affect treaty relations. The draft articles should likewise cover military occupation (regardless of whether it was accompanied by protracted armed violence or armed operations) and territories placed under international administration. Article 5, paragraph 1, should indicate that the application of certain human rights and environmental law principles during an armed conflict was determined by the relevant *lex specialis*, namely the law designed to regulate the conduct of hostilities.

37. In draft article 4, the Special Rapporteur had made the intention of the parties to a treaty the main yardstick for ascertaining its susceptibility to termination or suspension. That criterion must, however, be interpreted in the light of other indicia in accordance with articles 31 and 32 of the Vienna Convention on the Law of Treaties and of the nature and extent of the armed conflict. The Commission should carefully re-examine draft article 10 in view of the wish expressed by several of its members that the article take account of developments since the second World War with regard to the prohibition of the illegal use or threat of the use of force. The effects of aggression and self-defence on the operation of treaties deserved scrutiny in the light of article 75 of the Vienna Convention. The Commission should likewise reflect further on the text of the resolution of the Institute of International Law (A/CN.4/552, para. 123) which contained a number of provisions on that delicate issue.

38. The tenth report on reservations to treaties (A/CN.4/558 and Add.1) dealt with some core issues and contained many useful guidelines. The freedom to formulate a reservation, mentioned in draft guideline 3.1, was not absolute and its exercise was limited by the compatibility of the reservation with the object and purpose of the treaty. The presumption of freedom to formulate a reservation was different in substance from the presumption of the validity of a reservation. The definition of the term "specified reservations" proposed by the Special Rapporteur in draft guideline 3.1.2 was the best possible solution. Reservations formulated by virtue of a reservation clause which did not specify what reservations were permitted should be subject to the compatibility test. The Special Rapporteur's thorough analysis of the criterion of the compatibility of a reservation with the object and purpose of a treaty and its scope of application was most welcome. In addition, the method he had proposed in draft guideline 3.1.15 for determining that object and purpose was a good one.

39. The question of State practice when States did not oppose the entry into force of a treaty between themselves and the author of a reservation to which they had objected on the grounds that it was incompatible with the object and purpose of the treaty, was most pertinent. Objections to reservations incompatible with the object and purpose of a treaty did not have the same legal effects as objections to reservations which had successfully passed the compatibility test. An incompatible reservation would be null and void, irrespective of the reaction of other States parties. An objection to an incompatible reservation was, however, important insofar as it might sometimes indicate the objecting party's position on the validity of the reservation itself. Such an objection could put strong pressure on the reserving State to withdraw its reservation or to amend it to bring it into line with the object and purpose of the treaty. Nevertheless, the absence of protest from States parties should not be read as tacit acceptance by them of the incompatible reservation. It ought to be made clear that articles 20 and 21 of the Vienna Convention on the

Law of Treaties did not apply to reservations falling under article 19 (c) of the Convention. In any case, the reserving State could always withdraw or modify an incompatible reservation, or withdraw from the actual treaty if its consent to be bound by that treaty depended on the reservation. That position was supported by recent State practice and regional jurisprudence. Furthermore, in many cases, it had been held that a State entering an incompatible reservation would continue to be bound by the treaty in question without the benefit of the reservation, especially when the treaty concerned human rights or environmental issues, since the aim of the States objecting to the reservation was to preserve the integrity of the treaty for the benefit of persons under the jurisdiction of the reserving State.

40. **Ms. Morariu** (Romania) said that the Special Rapporteur's aim, which her delegation endorsed, of promoting and strengthening the security of legal relations between States by ensuring, where possible, that treaties remained operational in the event of an armed conflict justified the introduction into the draft articles of some provisions that might otherwise have seemed superfluous. Her delegation was thus in favour of retaining draft article 3, which expressly recognized that the outbreak of an armed conflict did not ipso facto terminate or suspend the operation of treaties.

41. With regard to draft article 4, her delegation considered that, important as the intention of the parties was, reference might also be made to other criteria, such as the object and purpose of the treaty, express provisions or characteristic features of the conflict in question. Such additional criteria would lend the draft article more flexibility and enable the Commission to focus more effectively on the specific effects of conflicts on treaties.

42. The aim of keeping treaties operational was also ample justification for the detailed provision contained in draft article 6: the presumption of continuation indicated the Special Rapporteur's pragmatic approach to situations that, on the face of it, would involve the suspension of treaty relations. Although the draft article appeared to be simply an application of the principle already stated in draft article 3, and therefore superfluous, the provision bore independent repetition in order to do away with any risk of presuming that a treaty that had given rise to an armed conflict was null and void.

43. Her delegation endorsed, up to a point, the inclusion of the list of categories of treaty in draft article 7, paragraph 2, so long as the list was purely indicative. Although it would be difficult to strike the right balance as to which categories to include or omit, the list would have its uses, so long as it did not claim to be exhaustive.

44. Lastly, her delegation had some reservations about draft article 10. The text should be reviewed, as the Special Rapporteur had himself acknowledged.

45. **Mr. Spacek** (Slovakia) said his Government basically supported the approach adopted by the Special Rapporteur for the topic "Effects of armed conflicts on treaties" (A/CN.4/552). He had been right to produce an entire set of draft articles providing an overall view of the topic and all the issues it raised. The definition of "armed conflict" should be handled with the utmost care. It should not a priori exclude internal armed conflicts, but should cover most of the situations in which armed violence was likely to affect the operation of treaties or interrupt treaty relations between States. Perhaps no definition of the term "armed conflict" should be provided, but if one were to be established, that given in the *Tadić* case ought to be borne in mind (A/60/10, para. 140).

46. On the other hand, the Special Rapporteur's limitation of the scope of the draft articles to treaties among States seemed too narrow; it should be widened to encompass treaties to which international organizations were also parties. The general principle that treaties continued in operation after the outbreak of an armed conflict was acceptable. A pragmatic approach should be taken in that respect. The draft articles belonged not so much to the law on armed conflicts as to the law of treaties. In fact, they would complement the Vienna Convention on the Law of Treaties in a field that had originally been excluded from it. Articles 11 to 14 did not pose any special difficulties.

47. His Government was generally satisfied with the set of 19 draft articles on diplomatic protection adopted on first reading by the Commission but intended to submit written comments as requested. It was to be hoped that upon receiving comments from Governments the Commission would be in a position to complete its work on the topic for presentation to the General Assembly at its sixty-first session. His delegation shared the view of the Special Rapporteur

that the clean hands doctrine should not be included in the draft articles, since it had been shown that the doctrine had chiefly been raised in claims between States for direct injury.

48. With regard to the topic "Fragmentation of international law", his delegation fully supported the Commission's methodology and found the topics of the various studies to be interesting and useful and likely to make a significant contribution in both theoretical and practical terms. It was pleased that the Study Group intended to present the final outcome of its work by the end of the current quinquennium.

49. **Mr. Sheeran** (New Zealand) said that, although the codification exercise on diplomatic protection was essentially a residual one, given the wide range of relevant treaties, especially on human rights and bilateral investment, diplomatic protection remained a useful tool, since there were few effective procedural remedies available in international law to individuals or corporations injured by a foreign State. In some areas the Special Rapporteur's proposals had gone further in the progressive development of international law than the Commission as a whole was prepared to accept. In some cases New Zealand had preferred the initial proposals, but it felt that the draft articles as adopted on first reading were a sound product with a reasonable mix of codification and sensible progressive development.

50. In particular, his delegation acknowledged the wisdom of a number of important legal points incorporated in the draft articles, including: not requiring proof of the so-called "genuine link" between the injured individual and the claimant's State of nationality; incorporating a significant exception to the continuous nationality rule; framing the rules relating to the diplomatic protection of dual nationals in a way that enhanced their prospects of obtaining appropriate protection; recognizing a limited exception to the *Barcelona Traction* rule on the nationality of corporations to permit protection of shareholders by their State of nationality in certain circumstances; broadening the exception to the exhaustion of local remedies rule; providing for the extension of diplomatic protection to refugees and stateless persons; and recognizing the right of both the State of nationality and the flag State to seek redress for injury suffered by ships' crews.

51. His delegation continued to support the Commission's very useful work on the topic "Fragmentation of international law", which would undoubtedly contribute to a wider understanding of the overall coherence of the international legal system. It might prove to be a good example of the kind of useful work of a non-traditional type that could be included in future work programmes. His delegation agreed that the outcome should be of practical value and was pleased that the Commission had kept that goal firmly in mind. In procedural terms, New Zealand strongly supported the plan for a two-part outcome, comprising a practice-oriented set of brief statements complemented by an analytical study synthesizing the various individual studies undertaken by members of the Study Group, which would serve as a sort of commentary. Since the topic was so strongly linked to the Commission's current membership, his delegation urged the completion of the full two-part outcome by the end of the quinquennium.

52. The topic "International liability in case of loss from transboundary harm arising out of hazardous activities", had been omitted from the agenda of the Commission's fifty-seventh session because the Commission was awaiting comments from Governments on the draft principles on the allocation of loss adopted on first reading. New Zealand believed that the risk of transboundary harm from hazardous activities was an issue that could only grow in importance with the advent of new technologies. Prevention was certainly one key to the issue, but the question of who should bear the loss in circumstances where loss occurred despite the application of the best known prevention measures could not be ignored. The draft principles, which were general and residual in nature, struck a fair balance between the rights and obligations of the operator and the victim of the harm and would help to fill a significant gap in the international legal order. It was to be hoped that the work on the topic could be concluded in 2006.

53. *Mr. Yañez-Barnuevo (Spain) took the chair.*

Agenda item 158: Observer status for the Hague Conference on Private International Law in the General Assembly (*continued*) (A/60/232; A/C.6/60/L.9)

54. **The Chairman** drew attention to draft resolution A/C.6/60/L.9 and noted several editorial corrections.

55. **Ms. Schwachöfer** (Netherlands) announced that China, Cyprus, Greece, Hungary, Latvia, Luxembourg, New Zealand, Portugal, Romania, Serbia and Montenegro and Sweden had joined the sponsors of the draft resolution.

56. *Draft resolution A/C.6/60/L.9 was adopted.*

Agenda item 159: Observer status for the Ibero-American Conference in the General Assembly (A/60/233; A/C.6/60/L.10)

57. **Mr. de Palacio España** (Spain), introducing draft resolution A/C.6/60/L.10, said that the Ibero-American Conference had been established in 1991 by the first Ibero-American Summit of Heads of State and Government with the participation of the sovereign Portuguese- and Spanish-speaking States of the Americas and Europe. The Summit of Heads of State and Government was the highest forum of the Conference, which was served by the Ibero-American Secretariat with headquarters in Madrid.

58. The Ibero-American Conference conducted a wide range of cooperation programmes, such as the fund for the development of indigenous peoples, the scientific and technology development programme and the post-graduate exchange programme. The many sectoral meetings of ministers which it organized addressed economic, financial and social issues, from migration and social security to promoting investment and alleviating external debt. The Conference's chief forum, the Summit of Heads of State and Government, had affirmed that democracy and respect for human rights and fundamental freedoms were the pillars of the Ibero-American community of nations and had reiterated their commitment to the purposes and principles established in the Charter of the United Nations. There was a broad spectrum of issues in which the Ibero-American Conference and the United Nations could work together, and the granting of observer status would help to strengthen their collaboration.

59. **Mr. Díaz Paniagua** (Costa Rica) said that the Ibero-American Conference was a valuable mechanism for coordination and cooperation among the nations of Latin America and the Iberian peninsula. His delegation noted with satisfaction the recent start-up of the Ibero-American Secretariat and the appointment of its first Secretary-General and therefore strongly supported the draft resolution to grant observer status to the Conference.

Agenda item 78: United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law (A/60/441; A/C.6/60/L.5)

60. **Mr. Tachie-Menson** (Ghana), speaking as Chairman of the Advisory Committee on the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, introduced the report of the Secretary-General on the Programme (A/60/441) and draft resolution A/C.6/60/L.5. He noted that the report covered the Programme activities for the biennium 2004-2005 and included the guidelines and recommendations regarding the execution of the Programme for the biennium 2006-2007. The Programme encompassed a variety of practical, hands-on activities benefiting both individuals and institutions, including fellowships for the study of international law, regional courses on law and international trade law seminars and symposiums organized in developing countries.

61. In view of the ever-growing importance of international law, there was an urgent need for concerted efforts to encourage its teaching and dissemination, particularly in the developing world, where there was a lack of resources but certainly not of talent. Although much was being done with a zero-growth budget, much more could be accomplished with larger contributions from Member States and their institutions. On behalf of the Advisory Committee he wished to thank the countries that had made contributions, which were mentioned in section IV of the report.

62. Draft resolution A/C.6/60/L.5 generally followed the pattern of previous resolutions on the topic. Among other things, it approved the guidelines and recommendations contained in section III of the report of the Secretary-General and adopted by the Advisory Committee, authorized the Secretary-General to carry out the activities specified in his report in 2006 and 2007 and to finance them from the regular budget as well as from voluntary contributions, and solicited such contributions from Member States and interested organizations and individuals.

The meeting rose at 11.35 a.m.

United Nations A/C.6/60/SR.20

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Held at Headquarters, New York, on Thursday, 3 November 2005, at 9.30 a.m.

Chairman: Mr. Yáñez-Barnuevo ..... (Spain)

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05-58531 (E)

The meeting was called to order at 9.40 a.m.

Agenda item 80: Report of the International Law Commission on the work of its fifty-seventh session (*continued*) (A/60/10)

1. **Mr. Wickremasinghe** (United Kingdom) said that the full set of draft articles on the effects of armed conflicts on treaties would provide States with a helpful overview of the topic. It would be interesting to see how elements of State practice informed the Commission's continued work on the subject. The Special Rapporteur was correct to view the topic essentially as an aspect of the law of treaties, rather than as an aspect of the law on the use of force. Draft article 4 was broadly correct because, both in theory and in practice, the intention of the parties to a treaty was likely to be the soundest guide to determining the effect of armed conflict on that treaty, irrespective of whether that intention was expressly stated in a provision or had to be inferred. Draft article 7 required further consideration, since the categories of treaties it listed might not always be readily identifiable, especially when they were defined in very general terms. It was questionable whether certain of the categories, such as treaties relating to the environment, ought to figure in the list at all. In any case, it should be made plain that the implication of continuity did not affect the position with regard to the law of armed conflict as the *lex specialis* applicable in times of armed conflict, even though continuity might suggest the concurrent application of different standards. Draft article 10 was broadly acceptable, but since the topic essentially concerned the operation of the law of treaties, it was not the right place to review the law on the use of force. Of course, an aggressor State should not benefit from its aggression, but terminating or suspending a treaty simply on the basis of the assertion that force had been used illegally was likely to be inimical to the stability of treaty relations.

2. With regard to the topic "Diplomatic protection" he concurred with the Special Rapporteur that consideration of the clean hands doctrine should not form part of the Commission's work, and hoped that the Commission would complete its work on the topic in 2006.

3. The legal issues raised by the fragmentation of international law comprised many of the most complex and challenging questions of contemporary international law. The Study Group's working method had been rather different from that normally followed by the Commission, without any of the usual detailed consultation of Governments. He therefore urged the Study Group and the Commission to proceed with caution. The outcome of the work should be confined to an analytical study on which Governments might wish to comment. Such a study could, where warranted, include the conclusions of its authors. The subject matter did not, however, lend itself to any kind of prescriptive outcome such as would be implied by the terms "guidelines" or "principles".

4. **Mr. Tugio** (Indonesia) said that the Commission played an important role in the codification of international law, but although the subject matter of public international law was of growing relevance to international relations as it widened and became more complex, the Commission should not embark on any new topics before it had completed some of those already included in its programme of work.

5. With regard to the topic "Responsibility of international organizations", the structural diversity of such organizations made it difficult to find a formula which would be suitable for all of them. For that reason, wherever possible, the draft articles should be modelled on the articles on the Responsibility of States for Internationally Wrongful Acts, particularly on those in chapter IV (articles 16 to 19). Caution was, however, needed, because the responsibility of an international organization for the act of a member State had not been examined thoroughly in any international tribunal outside Europe. Draft article 8, paragraph 2, was somewhat controversial, because it raised the status of an organization's administrative and procedural rules to the same plane as its binding resolutions.

6. The topic "Expulsion of aliens" was particularly relevant in the contemporary world, where globalization had led to much greater transboundary movements of people. The topic should include an examination of the situation of migrant workers, taking into account the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families, because they too could be considered aliens by the host country, even if they were legally present in its territory. Human rights regimes and other fields of international law clearly had a bearing on the expulsion of migrant workers. For that reason, States must seek to reconcile their national immigration laws with their international legal

obligations, respect for the rule of law and the protection of aliens' fundamental rights.

7. States were under an obligation to provide the fair and just procedures for expulsion to which individuals were entitled under international law. Hardship, violence or unnecessary harm to the alien must be averted and detention should be avoided, save when an alien upon whom an expulsion order had been served refused to leave the country, or tried to elude the control of State authorities. The alien had to be given a reasonable amount of time to settle his or her personal affairs before leaving the country. The draft articles should not cover refusal of admission, internally displaced persons or extradition for the purpose of prosecution, since those were separate sets of issues governed by different legal norms.

8. He was pleased that the Special Rapporteur for the topic "Shared natural resources" had recognized the importance of making explicit reference to General Assembly resolution 1803 (XVII) in the preamble to the draft articles. His Government believed that transboundary aquifers should be subject to the national jurisdiction of the States in whose territory they were located. Arrangements among aquifer States should therefore take priority over any other instrument. The distinction between recharging and non-recharging transboundary aquifers was welcome and in line with the principle of sustainable development. The draft articles should not be modelled solely on the provisions of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, since the latter had not yet entered into force, but should be balanced by other approaches.

9. The draft articles on the effects of armed conflicts on treaties should apply only to armed conflicts of an international character. Reference to the *Tadić* case would overextend the ambit of the draft articles to non-international conflicts, which would be inappropriate and inconsistent with draft article 2 (b). His Government would, however, be prepared to widen the scope of the draft articles to include treaties between States and international organizations, since the implementation of such treaties might, in some circumstances, be precluded by an armed conflict.

10. As far as diplomatic protection was concerned, a State had the right to exercise diplomatic protection and to seek a suitable remedy if one of its nationals had suffered injury caused by another State. It was important to remember that diplomatic protection was a sovereign prerogative of the State of nationality of the person concerned and a discretionary right of that country. The Special Rapporteur's constructive approach and his recommendation that the clean hands doctrine should be excluded from the draft articles was likely to lead to a consensus, which would enable the Commission to focus on more practical matters requiring closer attention.

11. **Mr. Samy** (Egypt) said that the preamble to the draft articles on shared natural resources should contain a reference to aquifer States' compliance with international laws and treaties. Such a preambular paragraph might be worded, "Having regard to international legitimacy and international law", or "Convinced that the objectives, principles, institutional regulations and further provisions included in this agreement should be consistent with international legitimacy and international law", or "Proclaiming further the following specific objectives, principles and institutional framework in conformity with the objectives and principles of the Charter of the United Nations and of international law".

12. Although the draft articles took the form of a framework convention setting forth a number of principles and guidelines, it ought to bind any State acceding to it. As the articles it contained would also be regarded as guidance for non-party States and the drafters of regional treaties, they should be carefully couched in precise legal language so that they did not become bones of contention in the future.

13. It would be vital to clarify the relationship between the new draft convention and the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, because the latter did not refer to aquifers. When it had been drawn up, it had been acknowledged that confined aquifers not linked to any international watercourse were a natural resource and that further efforts would be needed to prepare rules to protect them. Nevertheless, while it was true that the subject matter of the two conventions was absolutely discrete, draft article 4, paragraph 1, of the new convention would be meaningless unless all parties to it had also acceded to the 1997 Convention.

14. Draft article 3 used the expression "arrangement" rather than "agreement" but, from a legal point of view, the word "agreement" would be more apt for a binding international treaty, whereas "arrangement" suggested

a more flexible bilateral or regional mechanism for cooperation. In order to secure the compatibility of the two conventions, draft article 3, paragraph 2, should be amended to read "Parties to an arrangement referred to in paragraph 1 shall consider harmonizing such arrangement where necessary with the basic principles of the present Convention".

15. Draft article 4, paragraph 2, repeated almost word for word article 311, paragraph 2, of the Convention on the Law of the Sea. It might be advisable to use language drawn from that Convention in the draft text on aquifers, notwithstanding the very different nature of the rights and obligations deriving from the Convention and of those relating to aquifers, in order to prevent any conflict in the relationship between earlier treaties and the new draft convention.

16. The principle of equitable and reasonable utilization embodied in draft article 5 probably offered the best means of avoiding disagreement prompted by States' varying notions of national sovereignty over natural resources. That principle might protect the interests of all States parties if it were properly formulated to take all relevant factors into consideration. To that end, the latter would have to be pinpointed and studied. It was right to draw a distinction between recharging and non-recharging aquifers, because plans to develop and use those resources were different and their levels of use and the amounts of water withdrawn from them were also dissimilar. It would, however, be difficult to agree on a term such as "significant harm" unless specific types of harm were identified.

17. It might be helpful if the proposed convention were to spell out in greater detail the institutional framework for cooperation and to mention existing mechanisms which might serve as useful examples in that respect. Since article 35 of the Vienna Convention on the Law of Treaties laid down that "An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing", draft article 13 should indicate that the convention did not impose obligations on non-parties. It was essential to include in the draft convention a reference to the prior notification of planned measures with possible adverse effects along the lines of articles 11 to 19 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses and an environmental impact assessment should be made obligatory.

18. He agreed with the Special Rapporteur for the topic "Responsibility of international organizations" that, although States' freedom to issue policy statements should be preserved, it was, at the same time, necessary to restrict individual acts that might affect the rights of third parties. It would be hard, but not impossible, to establish a comprehensive legal framework covering individual acts, because the Vienna Convention on the Law of Treaties had already established a number of principles governing such acts.

19. With regard to the topic "Fragmentation of international law", he concurred with the view expressed in paragraph 485 of the Commission's report (A/60/10) that the topic's implications should be studied in greater depth. Such a study should concentrate on producing general guidelines allowing for a sufficiently flexible interpretation of treaties. It was important to arrive at rules on the application of disconnection clauses. The treaties laying down the objectives of regional integration organizations were always predicated on international law and therefore had to be implemented in accordance with it. It was also vital to preserve the hierarchy of international law in keeping with the Vienna Convention on the Law of Treaties which stated that a treaty was void if it conflicted with a peremptory norm of general international law.

20. The Sixth Committee must take account of all the rules on the expulsion of aliens which were to be found in customary international law, international treaty law, national legislation and State practice, with a view to developing those rules whenever appropriate or possible. The Commission's text must, however, make it absolutely clear that mass or collective expulsions were prohibited.

21. His Government agreed with the views expressed in the tenth report of the Special Rapporteur for the topic "Reservations to treaties" (A/CN.4/558 and Add.1), since they were in conformity with the provisions of the 1969 and 1986 Vienna Conventions on the Law of Treaties. Any further work on reservations to treaties should abide by the framework they provided.

22. **Mr. Hasegawa** (Japan) said that his delegation had been pleasantly surprised to see an entire set of draft articles proposed in the Special Rapporteur's first

report (A/CN.4/550) on the complex topic "Effects of armed conflicts on treaties". Although preliminary, the draft articles provided a useful overview. His delegation wondered whether it was correct under the Charter of the United Nations to assume that there was no difference between an aggressor State and a State exercising the right of self-defence with regard to the legal effect of armed conflict on treaty relations. With regard to the intention of the parties as the criterion for determining the susceptibility of a treaty to termination or suspension in case of armed conflict as proposed in draft article 4, it was not usually the case that States concluding treaties would anticipate the possibility of armed conflict occurring between them, so that other criteria would seem to be necessary. Moreover, it was not clear whether the concepts of suspension and termination should be dealt with in a single article, as they were in draft article 8, since their legal effects might be different; that point required further study. His delegation agreed with the Special Rapporteur that the draft articles were not yet ready to be referred to the Drafting Committee.

23. His delegation would like to commend the Study Group for the progress made on the very ambitious topic "Fragmentation of international law", which was not a subject of academic interest alone but was an important problem that must be addressed by practitioners when negotiating agreements. There was a potential overlap or conflict, for instance, between rules governing international trade and those concerning environmental and cultural issues. Even if the States involved in the rule-making process made an effort to avoid overlap or conflict, ambiguity in the rules governing the law of treaties, especially those relating to *lex specialis*, could cause problems that might undermine the stability and credibility of international law. It was essential for practitioners to have a clear understanding of the relationships among various legal instruments. In that regard, his delegation appreciated the approach taken by the Study Group in concentrating on issues relating to the Vienna Convention on the Law of Treaties.

24. **Mr. Al-Adhami** (Iraq) said his delegation thought that the 14 draft articles on the effects of armed conflicts on treaties proposed by the Special Rapporteur provided a good basis for further work on a very difficult topic. However, it felt that draft article 1 made the scope of application of the draft articles too narrow by limiting them to treaties between States, thus excluding treaties concluded by international organizations. With regard to draft article 2, his delegation favoured the inclusion of non-international armed conflict in the definition of armed conflict, since it would address situations that actually existed and required regulation.

25. Draft article 3 provided that the outbreak of an armed conflict did not ipso facto terminate or suspend the operation of treaties. Although the concept of continuity proposed by the Special Rapporteur was significant for the stability and certainty of international relations, it unfortunately ran counter to the practice of States, which showed clearly that armed conflicts led to the automatic suspension of some kinds of treaty. In fact, it was inconceivable that the parties to an armed conflict would implement all the treaties they had concluded, for obvious reasons. In that light, the draft article was unrealistic and should be redrafted or eliminated.

26. With regard to the indicia of susceptibility to termination or suspension of treaties in case of an armed conflict set forth in draft article 4, his delegation agreed with the criterion of intention, but had reservations about the inclusion in paragraph 2 (b) of the criteria of the nature and extent of the armed conflict in question. If the treaty did not contain provisions revealing the intention of the parties, their intention should be deduced from such elements as the preparatory work of the treaty, the circumstances of its conclusion, the nature of the treaty and how it had been applied.

27. **Mr. Malpede** (Argentina) commended the work of the Special Rapporteur for the topic "Effects of armed conflict on treaties". However, the content of the memorandum by the Secretariat entitled "The effect of armed conflict on treaties: an examination of practice and doctrine" (A/CN.4/550 and Corr.1) was a cause of serious concern to Argentina. In paragraphs 87, 103 and 104 the document referred to matters related to the dispute between Argentina and the United Kingdom concerning sovereignty over the Malvinas, South Georgia and the South Sandwich Islands. Although the double nomenclature (Falkland Islands (Malvinas)) required pursuant to United Nations administrative instructions and editorial directives was used, the footnote also required in those directives concerning the existence of a dispute over sovereignty had been omitted. That omission should be corrected.

28. Moreover, Argentina objected to the use of the word "invasion" in paragraph 103 of the memorandum. The Malvinas, South Georgia and the South Sandwich Islands and the surrounding maritime areas were an integral part of the territory of the Republic of Argentina and were illegally occupied by the United Kingdom. The international community recognized that the islands were the subject of a dispute over sovereignty. The General Assembly and the Special Committee on Decolonization had adopted many resolutions urging the parties to resume negotiations with a view to finding, as promptly as possible, a just, peaceful and definitive solution to the dispute.

29. Argentina rejected the opinions to be found in paragraphs 5, 87, 103, 104 and 161 of the memorandum with respect to the Malvinas, since they did not conform to the historical facts. For example, paragraph 87 stated that Spain had "abandoned" the islands. That statement was incorrect and overlooked the fact that the Republic of Argentina had succeeded to the Spanish title. Moreover, in its diplomatic protest to the United Kingdom in 1885, Argentina had invoked the Nootka Sound Convention of 1790; hence, both parties to the dispute agreed that the Convention applied with respect to the Malvinas.

30. A study of State practice should be based on consultations with Governments. When such practice involved two or more States, comments on practice could only be useful if based on the practice of both States concerned and hence impartial. In analysing the effect of armed conflicts on the termination or suspension of a treaty, it was important to establish which obligations under the treaty remained in force during or following armed conflicts. Such obligations should be differentiated clearly from acknowledgements of factual or legal circumstances that the parties to a treaty had made upon concluding it. The principle of good faith required that the acknowledgement of facts or circumstances, such as the recognition of the existence of a dispute by a State party to the dispute, could not be changed by armed conflict.

31. The principle of continuity of treaty obligations, as reflected in draft article 3, was fundamental. Argentina encouraged the Commission to continue its work on the subject, approaching the law of treaties in the light of the prohibition against resort to the threat or use of force embodied in the Charter of the United Nations.

32. **Ms. Wilcox** (United States of America) said it was encouraging to see that the Special Rapporteur, in his set of draft articles on the effects of armed conflicts on treaties, had adopted an approach that would encourage continuity of treaty obligations where there was no genuine need for suspension or termination. Draft article 4, a key article, reflected the notion that the intention of the parties at the time of the conclusion of the treaty should be determinative. Her Government felt that that approach was problematic, since parties negotiating a treaty generally did not consider how its provisions might apply during armed conflict. It would be more sensible to consider other factors, including the object and purpose of the treaty, the character of specific provisions and the circumstances relating to the conflict, rather than to rely on a presumption of intention that might not exist.

33. With regard to draft article 5, her delegation agreed with the suggestion that reference should be made in the article to the principle enunciated by the International Court of Justice in its advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* to the effect that, while certain human rights and environmental principles did not cease to apply in time of armed conflict, their application was determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which was designed to regulate the conduct of hostilities.

34. Draft article 7 listed 12 categories of treaty the object and purpose of which involved the necessary implication that they would continue in operation during an armed conflict. Such a categorization of treaties was problematic, since treaties did not automatically fall into one of several categories. Even classification of particular provisions was difficult, since the language of similar provisions and the intention of the parties could differ from treaty to treaty. It would be more useful, for the guidance of States, to enumerate the factors that might lead to the conclusion that a treaty or some of its provisions should continue or should be suspended or terminated in the event of armed conflict. Her delegation intended to respond to the Commission's request for more information concerning contemporary practice on the topic prior to its next session.

35. Her delegation congratulated the Commission for adopting on first reading a complete set of draft articles on diplomatic protection and was pleased that the Commission had decided to omit the clean hands

doctrine from the draft articles. The United States would submit further written comments to the Commission as requested. Her delegation's view was that the current project on diplomatic protection should be limited in scope to the codification of customary international law, or at most should vary from or supplement it only to the extent warranted by sound public policy considerations supported by a broad consensus of States.

36. On the topic "Fragmentation of international law", her delegation agreed that it was not suitable for draft articles and approved the emphasis on ensuring that the outcome of the Commission's work should be of practical use to legal experts in foreign offices and international organizations and to judges and administrators coping with questions concerning conflicting and overlapping obligations resulting from different legal sources. With respect to the issue of hierarchy in international law, her delegation agreed that the Study Group should not seek to produce a catalogue of norms of *jus cogens*, instead leaving the full content of the principle to be worked out in State practice. It was important that the Commission should not adopt any rule that could be interpreted as limiting the primacy of Charter obligations or the authority of the Security Council. In view of the uncertainty regarding what fell under the categories of *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations, general pronouncements about the relationship among those categories should be avoided.

37. **Ms. Mas y Rubí Spósito** (Bolivarian Republic of Venezuela) said, with respect to the topic "Reservations to treaties", that draft guideline 3.1.2, which defined the term "specified reservations", unduly limited the right of States to formulate reservations to the treaty which were not incompatible with its object and purpose. It was customary in conventions adopted within the context of the United Nations to include a standard clause providing for the compulsory jurisdiction of the International Court of Justice in case of dispute, but allowing a State to opt out of the provision by means of a declaration to that effect. Such a formal declaration would constitute a reservation that might be considered to fall into the category of "specified reservations" mentioned in draft guideline 3.1, subparagraph (b), whose main characteristic was that they excluded the possibility of formulating other reservations. In other words, if a treaty permitted only specified reservations, it was clear that other reservations were prohibited. The conclusion to be drawn from the draft guidelines as they stood would be that any convention adopted in the context of the United Nations and including such a clause would be a "closed" instrument that would only allow for the formulation of that reservation and no other. To avoid that result, a paragraph should be added to draft guideline 3.1.2 providing that a reservation made to a treaty in order to exclude the compulsory jurisdiction of the International Court of Justice should not be considered as falling within the definition of "specified reservations" for the purposes of draft guideline 3.1.

38. Her delegation believed that the topic "Unilateral acts of States", although difficult and controversial, was susceptible to codification and progressive development. The systematic examination of State practice in the various types of unilateral acts was valuable. The context in which the acts were formulated, the persons formulating them, their oral or written form and the reactions of addressees and third parties were all important factors in determining their legal effects. Her delegation wished to stress the importance of defining unilateral acts and favoured a definition of a unilateral act as a unilateral statement by a State, formulated by a person competent to represent and commit the State at the international level, by which that State expressed its will to create obligations or produce other legal effects under international law. Progress could be made on the topic at the next session of the Commission if the Special Rapporteur were to present some preliminary conclusions accompanied by examples of practice.

39. With regard to the topic "Shared natural resources", her delegation considered that the changes and additions proposed by the Special Rapporteur added precision to the draft articles from the hydrological and geological standpoint with respect to the scope of the groundwaters to be covered by a convention and clarified the framework in which the sustainability of groundwater sources would be addressed. The new draft article 2, "Use of terms", made the definitions clearer from both a technical and a legal standpoint. It seems evident that every State would exercise jurisdiction and permanent sovereignty over the portion of the aquifer that was in its territory and would bear in mind the commitment to ensure equitable and reasonable utilization of the aquifer, as

provided for in draft article 5, within the framework of sustainable development. However, prevention of harm, the obligation not to cause harm and responsibility and compensation for harm caused to another aquifer State were aspects that needed to be further developed.

40. An important feature of the draft articles was the regular exchange of data and information among aquifer States to share and improve knowledge of the aquifer systems. In that regard, a number of Latin American States had already developed arrangements to manage transboundary groundwaters, such as the Guaraní Aquifer System Project. Based on that experience, a transboundary aquifer programme for the Americas had been established with the support of the Organization of American States, the United Nations Educational, Scientific and Cultural Organization and the International Hydrological Programme. The Bolivarian Republic of Venezuela had been working with Colombia and Brazil, respectively, to study possible transboundary aquifers it shared with those States.

41. However, her delegation reiterated its objection to inclusion of the term "shared natural resources" in a possible convention, since it did not see how States could share sovereignty over natural resources. For that reason, it concurred with the view that it was essential to include a reference in the draft articles to the principle of the permanent sovereignty of States over their natural resources.

42. **Mr. Zabolotskaya** (Russian Federation) said that the Commission's report raised a number of issues connected with the effects of armed conflicts on treaties which deserved close attention: whether the outbreak of an armed conflict terminated the operation of a treaty with respect to the parties to the conflict; the effect of the legality of the conduct of the parties to an armed conflict on the operation of a treaty to which they were parties; and the various consequences of armed conflicts for treaty parties and States parties and non-parties to the conflict. The Commission had been right to consider the topic in the context of the international law of treaties. It should not take up issues already regulated in other branches of law: for example, by defining the concept of armed conflict or determining cases of lawful and unlawful use of force. The scope of the topic should not extend to armed conflicts of a non-international nature, for problems arising in such situations could be solved on the basis of the Vienna Convention on the Law of Treaties.

43. While her delegation could agree that the outbreak of an armed conflict did not necessarily terminate or suspend the operation of a treaty between the States parties to the armed conflict and non-party States, there might still be an automatic element in the effects of the armed conflict on the relations between the parties to that treaty.

44. The concept of the intention of the parties was extremely subjective and could hardly be applied in practice without qualification. That was clear from draft article 7, which listed the categories of international treaty which could not be terminated by an armed conflict. In general terms, the Russian Federation believed that the Commission's work on the topic was making a significant contribution to the clarification of the law.

45. On the topic "diplomatic protection", her delegation agreed with the Commission's conclusion that the "clean hands" doctrine should not be included in the draft articles. It hoped that at its next session the Commission would complete its work on the draft articles.

46. **Mr. Ayua** (Nigeria) welcomed the 25 draft articles on the law of transboundary aquifers, and endorsed the prominence they accorded to bilateral and regional arrangements, and the emphasis on equitable and reasonable utilization, the obligation not to cause harm and the regular exchange of data and information. His delegation noted with keen interest draft article 18, providing for scientific and technical assistance to developing countries, and agreed with the provisions in draft articles 19 and 20 on emergency situations and protection in time of armed conflict.

47. Turning to the topic "Effects of armed conflicts on treaties", he said that his delegation supported the view that the draft articles should be compatible with the purposes and principles of the Charter of the United Nations and should take into consideration, in particular, the wrongful character of recourse to force in international relations and the fundamental distinction between aggression and legitimate individual or collective self-defence or the use of force *in the context of the collective security system* established by the United Nations. It also agreed that the topic should be approached within the context of the Vienna Convention on the Law of Treaties, and,

that the scope of the work should include both internal and international armed conflicts, since some internal conflicts usually had wider regional or international repercussions, or both. His delegation agreed that treaties entered into by international organizations should be included within the context of the topic, and looked forward to the Special Rapporteur's fuller examination of such issues in his next report.

48. With regard to the topic "Responsibility of international organizations", his delegation supported draft article 8, which would require the organs, members and staff of an international organization to act in conformity with their mandates. In his fourth report, the Special Rapporteur should consider the possibilities for remedy and compensation for injuries arising from breaches of those mandates.

49. Concerning the expulsion of aliens, he said that the problems associated with the treatment of aliens were of abiding relevance, especially in the contemporary world where national interests had to be reconciled with the reality of globalization and a multiplicity of relevant international instruments. The preliminary report by the Special Rapporteur was a good basis for further work on the topic. Although the right of sovereign States to expel aliens, particularly for security reasons, was guaranteed by law, that right must be exercised in accordance with due process, the act of expulsion must be formal in order to allow for appeal, and the persons expelled should not be subject to torture or abuse. Compulsion and detention must be avoided, except when the alien refused to leave or tried to escape from the control of State authorities.

50. The decision to expel must not be based on any religious, ideological, ethnic or racial consideration, or any other reason mentioned in the various human rights and related instruments. A future set of draft articles should include a provision allowing for the application of regional and international treaties to provide further protection to the persons concerned. In particular, measures should be established to protect the property rights of expellees. Furthermore, expulsion should be carried out only after due consultation and exchange of information with the expellee's home country.

51. As to the other decisions and conclusions of the Commission, his delegation welcomed and encouraged the interactions, during the fifty-seventh session, between the Commission and the other bodies mentioned in its report (A/60/10, paras. 503-509), which facilitated the realization of its mandate. In addition, his delegation welcomed the annual holding of the International Law Seminar, which played a crucial role in introducing young lawyers, especially from developing countries, to issues of international law and the work of the Commission, and appreciated the voluntary contributions to the Seminar from Member States.

52. It was regrettable that few representatives of developing countries participated in the discussion of the Commission's report. Moreover, there was often a poor response from those countries to requests for comments from Member States. That trend, if not stemmed, could militate against universal acceptance of any instruments resulting from the deliberations of the Commission and the Sixth Committee, since countries which had not been participating — probably due to a lack of capacity — might not see the need to sign and ratify instruments in whose formulation they had played little or no part. The Commission, the Sixth Committee and the Office of Legal Affairs should seek to identify the root causes of that problem and take joint proactive measures to address it, including, for example, regular seminars on topics studied by the Commission, jointly hosted with regional and subregional bodies. Efforts should also be made to ensure that the Commission's reports were issued at least two months before their consideration by the Sixth Committee, thus allowing sufficient time for them to be sent to Governments for consideration.

53. **Mr. González** (Mexico), referring to the topic "Diplomatic protection", said that the Special Rapporteur's examination of the feasibility of applying the "clean hands" doctrine was timely and useful, and his approach was correct. To determine whether that doctrine was applicable exclusively in the context of the exercise of diplomatic protection and hence should be included in the draft articles, the Special Rapporteur had studied its applicability to disputes involving inter-State relations properly so-called and to diplomatic prevention, and had examined cases in which the doctrine had been in the context of diplomatic protection. On the basis of his findings, contained in his sixth report (A/CN.4/546), the Special Rapporteur had concluded — rightly, in the Mexican delegation's regard — that although the "clean hands" doctrine might be of importance with regard to the determination of the international responsibility of States, it did not constitute *lex specialis* applicable to

diplomatic protection and therefore should not be included in the draft articles.

54. Turning to the topic "Shared natural resources", he said that once the Commission had completed its work on transboundary groundwaters it should consider very carefully whether to continue by taking up the sub-topics relating to oil and gas. His delegation agreed that the work on groundwaters should take into account, to a certain extent, the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses; nevertheless, groundwaters were different from surface waters and consequently the development of a legal framework for transboundary aquifers should respect their environmental features and vulnerability. His delegation also agreed that the draft articles should not cover the obligations of non-aquifer States. However, the precautionary principle — which was emphatically a "principle" — should be mentioned somewhere in the instrument. The preamble, for instance, might include a paragraph describing it, similar to the one in the preamble to the Convention on Biological Diversity, sparing the Commission long discussions as to whether the precautionary principle was a "principle" or an "approach."

55. The preamble might also contain a reference to General Assembly resolution 1803 (XVII) on permanent sovereignty over natural resources. Moreover, the question of transboundary aquifer systems should be viewed through the prism of sustainable development; and therefore reference should be made to principle 2 of the Rio Declaration on Environment and Development, which set out the sovereign right of States to exploit their own resources and their responsibility to ensure that activities within their jurisdiction did not cause damage to the environment of other States. It was also important to consider evolving State practice on that matter. Although such practice was admittedly scarce and often embryonic, juridical and institutional developments in the various regions should form the basis for the Commission's work on the topic.

56. His delegation supported the prominence given to such matters as the obligations of aquifer States to cooperate and not to cause harm and the need to ensure equitable and reasonable utilization. It agreed that the draft articles should emphasize bilateral and regional agreements, as long as such agreements were compatible with the general principles set out in the articles, and supported the inclusion of the reference to other activities that had or were likely to have an impact on transboundary aquifers and aquifer systems.

57. His delegation also supported the distinction drawn by the Special Rapporteur between recharging and non-recharging aquifers, although that distinction must extend to the threshold applicable to the obligation not to cause harm. The threshold for recharging aquifers should be significant harm, whereas for non-recharging aquifers the threshold should be lower, because of the vulnerability caused by the low amount of water recharge. Especially important was the obligation to provide compensation when harm was done to a transboundary aquifer. His delegation therefore requested the Commission to formulate the obligation to compensate in binding terms, since as it stood the relevant draft article weakened the obligation. In managing aquifers, aquifer States should consult with and provide information to populations dependent on their equitable and reasonable utilization.

58. The Commission should include the topic of technology transfers in the draft article on scientific and technical assistance to developing countries. Furthermore, the importance of ensuring water quality should be considered one of the factors relevant to the equitable and reasonable utilization of groundwaters, in conformity with the obligation to protect and preserve ecosystems under draft article 12.

59. His delegation agreed that the final form of the draft should be considered at a later stage. If it took the form of a legally binding instrument, the wording should be adjusted accordingly.

60. **Mr. Lamine** (Algeria), referring to the topic "Responsibility of international organizations", said that his delegation agreed that the draft articles on the topic should follow the general pattern of the articles on Responsibility of States for Internationally Wrongful Acts with respect to the existence of a breach of an international obligation and to responsibility, and therefore supported the approach taken by the Special Rapporteur. His delegation favoured the inclusion in the draft articles of a provision on aid or assistance given by a State to an international organization in the commission of an internationally wrongful act, and on cases in which a State directed and controlled, or coerced an international organization in the commission of an internationally wrongful act. The responsibility of the State was entailed when it participated deliberately in the internationally wrongful

conduct of an international organization by providing it with aid or assistance and the breached violation was also opposable to the State concerned.

61. With regard to the expulsion of aliens, an almost complete consensus seemed to have emerged in the Commission regarding the approach to be taken to that topic. His delegation supported the approach taken to the main issue, namely reconciliation of the right to expel with the requirements of international law and, in particular, human rights law

62. With reference to the other decisions and conclusions of the Commission, the reconstitution of the Working Group on the long-term programme of work was welcome, as was the inclusion of the topic "The obligation to extradite or prosecute (aut dedere aut judicare)" in the Commission's current programme of work and the appointment of a Special Rapporteur for that topic. The obligation to extradite or prosecute was ripe for codification and was of crucial importance for international judicial cooperation in criminal matters, especially with regard to terrorist and other crimes threatening the international community. Although the obligation to extradite or prosecute was embodied in many international legal instruments, especially the various sectoral counter-terrorism conventions, that principle derived from customary international law. The approach and the preliminary plan of action proposed by the Special Rapporteur were acceptable, because they incorporated new trends in international law and the concerns of the international community.

63. As to the topic "Shared national resources", his delegation supported the structure and approach adopted in the draft articles, and considered that in view of the paucity of State practice the Commission should not attempt to codify that area of international law but rather should focus on its progressive development on the basis of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses. In addition, his delegation agreed that the draft articles should be viewed as an application of general international law, and that the principle of permanent sovereignty over natural resources deserved to be discussed in the operative part of the draft articles, in particular since precedents existed. Concerning draft article 14 on prevention, reduction and control of pollution, the Special Rapporteur's approach was a wise one. The precautionary principle, important as it was, must not be interpreted so as to constitute an obstacle to economic and scientific activity.

64. Turning to the topic "Effect of armed conflicts on treaties", he said that the notion of armed conflict should be defined in the widest possible manner, to include blockades as well as military occupation unaccompanied by violence. It was doubtful, however, whether the topic should include internal armed conflicts, despite the difficulty of determining whether armed conflicts were international or internal in nature. As to the indicia of susceptibility to termination or suspension of treaties in case of an armed conflict, his delegation supported the criterion of intention, which took the context of each situation into account, and felt that draft article 10 should be reviewed, so as to take into consideration the legality of the conduct of the parties to an armed conflict.

65. **Mr. Momtaz** (Chairman of the International Law Commission) said that the detailed and substantive comments made by the members of the Committee would be very useful. However, as the Commission worked as a collective body, it was not appropriate for its Chairman to respond to comments on policy or technical issues. The Commission would of course pay close attention to comments from Governments: in fact, it relied on such feedback to guide its work. That was particularly important as the Commission moved on to topics for which there was less State practice or generally accepted customary law.

66. The Commission intended to complete its consideration on second reading of the topics "International liability for transboundary harm" and "Diplomatic protection". As its second readings were based essentially on written comments, he urged Governments to submit their comments as soon as possible.

Agenda item 159: Observer Status for the Ibero-American Conference in the General Assembly (*continued*) (A/60/233; A/C.6/60/1/Add.2 and A/C.6/60/L.10)

67. *Draft resolution A/C.6/60/L.10 was adopted.*

Agenda item 78: United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law (*continued*) (A/60/441; A/C.6/60/L.5)

68. **Mr. González** (Mexico) said that the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law contributed to the training of international lawyers in all countries, particularly the developing countries. Among the activities carried out under the Programme

described in the report by the Secretary-General on the item (A/60/441) his delegation drew particular attention to the annual International Law Seminar, which enabled new generations of lawyers to acquaint themselves with the topics studied by the International Law Commission, the publications on the Organization's legal practice, and the United Nations Audiovisual Library in International Law. In addition to their direct effects, the activities carried out by the United Nations had a multiplier effect on national promotional and teaching work. In Mexico, such activities had enhanced the quality of the training seminars for academics.

69. In view of the financial constraints on the maintenance of the activities, it was essential for countries to make voluntary contributions to the Programme. Relatively small amounts had a major impact on the attainment of the purposes of the United Nations. Mexico itself had made a number of modest contributions, demonstrating its commitment to improving knowledge of international law and its strict application.

70. **Mr. Makarewicz** (Poland) said that the item had become particularly topical with the growing acceptance by the international community of the rule of law as a fundamental basis of international relations. Governments had reaffirmed their commitment to international law in the World Summit Outcome. It was noteworthy in that context that "A just world under law" would be the central theme of the centennial meeting of the American Society of International Law in 2006. Such meetings provided an opportunity for reflection on the responsibility of international lawyers to bring about a more just, safe and prosperous world. Such an achievement would also require a concerted effort by States, governmental and non-governmental organizations, the business community and civil society. In that same connection, in 1999 the Secretary-General had identified the consolidation and advancement of international law as the Organization's second most important goal, after peace and security.

71. The commitment to promoting respect for international law must be strengthened, and the policies of States and international organizations must be consistent with that aim. The only way of dealing with those who violated international law was to disseminate knowledge of its basic principles and its spirit to the millions of potential victims of violations. That was why the teaching of international law was so important. The 1997 resolution of the Institute of International Law on the teaching of public international law could serve as a model for the standardization of the teaching of the subject.

72. He wished to pay a tribute to the eminent Polish jurist, Professor Manfred Lachs, whose work *The Teacher in International Law: Teachings and Teaching* should be the main source of knowledge on the subject for international lawyers, teachers and politicians. Professor Lachs had stressed the importance of the teaching of law and the need to strengthen the moral commitment of internationalists to shaping a more humane world. Despite all the activities described in the Secretary-General's report, much remained to be done not only by the United Nations but also and primarily by Member States.

73. It was in the common interest to provide free access to the website of the United Nations Treaty Collection. His delegation welcomed the news that access to the database would be expanded.

74. **Mr. Mwandembwa** (United Republic of Tanzania) said that it was impossible to overemphasize the role of the Programme of Assistance in helping developing countries to build up their capacity. Furthermore, the various activities described in the Secretary-General's report had also provided a basic grounding for persons who would serve the international community in the field of international law.

75. His delegation commended the activities of the Office of Legal Affairs in support of the Programme, in particular the drafting and distribution of United Nations legal publications. The United Nations Institute for Training and Research also deserved commendation in that connection.

76. The United Republic of Tanzania extended its sincere thanks to the Member States, listed in section IV of the report, which had made generous contributions to the Programme in the biennium 2004-2005. It had always advocated the Programme's expansion and an increase in the resources provided under the regular budget to the Office of Legal Affairs.

77. **Ms. Zabolotskaya** (Russian Federation) said that the Russian Federation had always attached importance to the work done by various bodies within and outside the United Nations system under the Programme of Assistance. The Programme's seminars and fellowships

offered opportunities for young international lawyers not only to improve their qualifications but also to discuss problems of international law in an informal setting.

78. The Russian Federation was a firm advocate of the application of the principles of international law in international relations. Indeed, the adoption of the Charter of the United Nations had been a milestone in that process. In June 2005 Russia had hosted an international conference to mark the sixtieth anniversary of the adoption of the Charter, which had conducted a productive discussion of various aspects of contemporary international law. The role of international law must be steadily enhanced, and the Programme would make a major contribution to that undertaking.

The meeting rose at 12.05 p.m.

United Nations A/C.6/60/SR.21

General Assembly
Sixtieth session

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Sixth Committee

Summary record of the 21st meeting
Held at Headquarters, New York, on Wednesday, 9 November 2005, at 11.30 a.m.

Chairman: Mr. Yáñez-Barnuevo ..... (Spain)

Contents

Agenda item 153: Report of the Committee on Relations with the Host Country (*continued*)

Agenda item 78: United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law (*continued*)

Agenda item 82: Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (*continued*)

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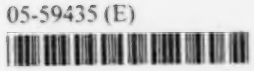
05-59435 (E)



The meeting was called to order at 11.40 a.m.

Agenda item 153: Report of the Committee on Relations with the Host Country (A/60/26 and A/C.6/60/L.15)

1. **Mr. Mavroyiannis** (Cyprus), speaking as Chairman of the Committee on Relations with the Host Country, introduced the Committee's report (A/60/26) and drew particular attention to the recommendations and conclusions set forth in chapter IV. He reported that, at the four meetings held during the reporting period, the Committee had discussed the use of motor vehicles, acceleration of immigration and customs procedures, entry visas, tax exemptions and travel regulations with representatives of the host country. The Committee on Relations with the Host Country was an important, and indeed the only, forum to resolve some of the problems faced by the diplomatic community in relation to the host country through a constructive exchange of views. It had proved to be an open, transparent and flexible body, in which any interested delegation could participate as an observer; all its members had equal standing, and it proceeded by consensus. Although a number of issues had generated intense interest, a spirit of willingness to cooperate had emerged in all meetings, and he would urge all Member States to maintain that positive climate and work towards strengthening the dialogue with the host country as a means of addressing any issues that might arise.

2. Speaking as the representative of Cyprus, he introduced draft resolution A/C.6/60/L.15 on the report of the Committee on Relations with the Host Country on behalf of the sponsors. He pointed out that the resolution endorsed the recommendations and conclusions contained in paragraph 72 of the report and referred, inter alia, to the Committee's continued review of the implementation of the Parking Programme for Diplomatic Vehicles; the request of a number of delegations for a shortening of the time frame applied by the host country for the issuance of entry visas to representatives of Member States, since the time frame posed difficulties for the full-fledged participation of Member States in United Nations meetings; and the Committee's anticipation that the host country would enhance its efforts to facilitate their participation in other United Nations meetings as appropriate.

3. **Mr. Watson** (United Kingdom), speaking on behalf of the European Union; the acceding countries Bulgaria and Romania; the candidate countries Croatia and Turkey; the stabilization and association process countries Albania, Bosnia and Herzegovina and the former Yugoslav Republic of Macedonia; and, in addition, Iceland, the Republic of Moldova and Ukraine, said that the Committee on Relations with the Host Country remained an important forum for discussing and resolving problems that might arise for delegations accredited to the United Nations in New York covering a diverse range of issues. The Union supported the recommendations and conclusions contained in the report and had full confidence in the host country's commitment to take any necessary measures to ensure the effective functioning of missions to the United Nations.

4. **Ms. Ramos Rodríguez** (Cuba) said that her delegation, as a member of the Committee on Relations with the Host Country, was interested in improving its work by promoting broad debate among its members and encouraging the active participation of other States. That Committee had an important role to play in advising the host country on issues arising in connection with the implementation of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations.

5. Her delegation also wished to stress the importance of the host country's applying the pertinent provisions of the Convention on the Privileges and Immunities of the United Nations, the 1961 Vienna Convention on Diplomatic Relations and the Headquarters Agreement in an appropriate manner. Among the especially sensitive issues considered by the Committee were the problems some delegations, including her own, had raised concerning issuance of entry visas. To cite just one example, the President of the Cuban National Assembly had been denied an entry visa to attend the second World Conference of Speakers of Parliament convened by the Inter-Parliamentary Union (IPU) at United Nations Headquarters in September 2005 on the ground that the Conference had been convened by IPU and not by the United Nations, even though the General Assembly in its resolution 59/19 had called upon the host country to extend the usual courtesies to participants of all parliamentary delegations of States Members of the United Nations at the Conference. Moreover, the head

of the Cuban delegation to the High-level Plenary Meeting held at the sixtieth session of the General Assembly had been issued a visa too late to enable him to participate in the events held on the first day of the meeting.

6. In addition, the host country had imposed travel restrictions on the personnel of certain missions and United Nations staff members of certain nationalities in an arbitrary and unjustified manner. For example, on some occasions the host country had refused travel permits to Cuban diplomats to attend meetings related to the United Nations that were held outside a 25-mile radius. The imposition of such restrictions on the movements of Cuban diplomats were unfair, selective, discriminatory and politically motivated, in contravention of the obligations of the host country under the Headquarters Agreement and diplomatic usage.

7. Her delegation urged the host country to reconsider its positions on entry visas and travel restrictions to bring them into line with the general principles of law, equality and non-discrimination and the provisions of international law.

8. **Ms. Zabolotskaya** (Russian Federation) said that the complicated issues arising in the relations between the United Nations and the host country must be resolved in a spirit of cooperation and in strict compliance with international law. The Committee on Relations with the Host Country had not succeeded in performing all its functions equally effectively, especially with regard to a number of recurring chronic problems.

9. Despite some progress in the implementation of the Parking Programme, it was still not fully operational. The authorities of the City of New York should follow the example of missions and their personnel in conscientiously carrying out their obligations under the Programme. They should in particular pay closer attention to the requests and recommendations of missions which continued to experience difficulties in connection with the Programme.

10. The timely issuance of entry visas determined to some extent the ability of Member States to participate fully in the measures taken by the United Nations in New York. The Russian Federation supported the Committee's recommendations concerning shortening the time frame for issuance of entry visas.

11. The travel regulations issued by the host country with regard to personnel of missions were not applied to the overwhelming majority of States. The Russian Federation was discriminated against in that regard; despite its persistence over the years in raising the question of removal of the restrictions, no tangible progress had been made. An early solution of the problem was important not only for the Russian Federation but for other countries as well; it would also enhance the authority of the Committee on Relations with the Host Country and the image of the Organization as a whole.

12. **Mr. Toro Jiménez** (Bolivarian Republic of Venezuela) said that his delegation wished to reiterate its position regarding the improper conduct of the host country. Owing to the delay in the receipt of entry visas for key medical and security personnel in the entourage of the President of the Republic, the latter had been forced to delay his travel to New York for the High-level Plenary Meeting of the General Assembly held in September 2005. The host country's conduct constituted a breach of its obligations under article IV, section 11, of the Headquarters Agreement.

13. In addition, diplomatic personnel of the Venezuelan mission had been subjected to insulting and humiliating treatment in United States airports. Although the representative of the host country had placed the blame on the airline personnel, the airlines had denied it, making it clear that the Department of Homeland Security, not the airlines, was responsible for the decision. However, even under the first hypothesis, the host country had an obligation under the Headquarters Agreement and the Vienna Convention on Diplomatic Relations to ensure that airport personnel were trained to understand and respect diplomatic immunities and privileges.

14. The facts related above led his delegation to conclude that the only solution was to move the Headquarters of the United Nations. The Organization could not remain in the territory of a State that persisted in violating the Headquarters Agreement and, even apart from that, daily created more enemies for itself throughout the world, so that the diplomatic community working at the United Nations was in constant danger.

15. In the short term, measures must be taken to prevent any interference with missions in the exercise of their functions. His delegation advocated the lifting

of travel restrictions on the personnel of certain missions as unfair, selective, discriminatory and contrary to the Headquarters Agreement and the Vienna Convention on Diplomatic Relations.

16. **Mr. Gunda** (Botswana) said that his delegation was concerned about the statement made a few days earlier by Senator Hillary Clinton to the effect that no aid should be provided to countries which did not pay their parking fines. Did that represent the position of the United States Government?

17. **Mr. Elji** (Syrian Arab Republic) said that every country had the right to make whatever arrangements for the parking of vehicles which it saw fit, and the diplomatic corps should abide by local laws. However, the Parking Programme was in contradiction with the host country's obligations under the Headquarters Agreement and the Convention on the Privileges and Immunities of the United Nations. Furthermore, the host country was not fulfilling its obligation to issue entry visas in good time to all members of official delegations.

18. **Ms. Wilsar** (United States of America) said that the United States was proud to serve as host country to the United Nations. Since 1946 the United States Government had fulfilled the corresponding obligations under international law in every respect and remained committed to doing so in the future. The United States appreciated the constructive spirit of the members of the Committee on Relations with the Host Country and welcomed in particular the participation of numerous observer delegations, which made the Committee's deliberations more representative.

19. The Parking Programme had been a success, for the number of parking tickets issued to diplomatic and consular personnel was now a small fraction of what it once had been, although a small number of missions were still experiencing problems with some aspects of the Programme. The host country remained committed to working with the authorities of the City of New York to ensure that the Programme functioned as intended. The United States Mission pledged to fulfil all of its obligations to the United Nations community under international law and expected each member of that community to respect local laws. The United Nations Legal Counsel had found the Parking Programme to be consistent with international law and practice.

20. The travel restrictions to which some missions had objected did not violate international law. Under the Headquarters Agreement the United States was not required to permit all members of missions to travel to other parts of the country except on official United Nations business. Travel to unofficial events was not governed by international agreements. Nevertheless, the United States had been able to modify and in some cases remove the restrictions imposed on certain missions.

Agenda item 78: United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law (*continued*) (A/C.6/60/L.5)

21. *Draft resolution A/C.6/60/L.5 was adopted.*

Agenda item 82: Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (*continued*) (A/C.6/60/L.13)

22. **Mr. Samy** (Egypt), introducing draft resolution A/C.6/60/L.13, said that the text was based on the resolution adopted at the preceding session, with some changes and additions to reflect the discussion in the Special Committee over the past year. In particular, reference was made in the thirteenth preambular paragraph and in operative paragraph 3 (d) to the Special Committee's readiness to engage, as appropriate, in the implementation of any decisions that might be taken at the High-level Plenary Meeting.

23. Since a separate draft resolution on the application of sanctions was not being submitted at the current session, the question was referred to in the preambular part of the draft resolution and in paragraph 16. Paragraphs 7 and 8 had been introduced in order to mark the sixtieth anniversary of the establishment of the International Court of Justice. Several new paragraphs had also been included on the subject of the *Repertory of Practice of United Nations Organs* and the *Repertoire of the Practice of the Security Council*.

24. **Mr. Mikulka** (Secretary of the Committee), referring to the programme budget implications of the draft resolution, said that, under the terms of paragraph 2, the Special Committee would hold its next session from 3 to 13 April 2006 and the total cost for conference servicing and documentation for that

meeting in all six official languages was estimated at US$ 489,700 (at 2006-2007 rates). Since the session had already been programmed in the draft calendar of conferences and meetings for the biennium, no additional appropriation would be required.

25. Under the terms of paragraph 12 of the draft resolution, the Secretary-General was requested to continue his efforts, within the level of the currently approved budget, to make all versions of the *Repertory of Practice of United Nations Organs* available in electronic format as early as possible. In that context, he drew attention to section VI of General Assembly resolution 45/248 B of 21 December 1990, in which the General Assembly reaffirmed the responsibility of the Fifth Committee for administrative and budgetary matters and the role of the Advisory Committee on Administrative and Budgetary Questions. The attention of the Committee was also drawn to paragraph 67 of the report of the Advisory Committee on Administrative and Budgetary Questions (A/54/7) and to paragraph 31 of document A/C.5/54/SR.21, which indicated that the use of the phrase "within existing resources" or similar language in resolutions had a negative impact on the implementation of activities and should therefore be avoided.

26. *Draft resolution A/C.6/60/L.13 was adopted.*

27. **Mr. Elji** (Syrian Arab Republic), explaining his delegation's position, said that since the proposed programme budget for the biennium 2006-2007 had not yet been adopted, his delegation sought an assurance that the use, in the draft resolution, of the phrase "within the level of the currently approved budget" would not, despite the statement by the Secretary of the Committee, in any way affect negotiations within the Fifth Committee over the resources to be allocated to the project of making the *Repertory of Practice of United Nations Organs* electronically available as soon as possible. Any adverse effect on the budget allocation resulting from the use of the phrase in the draft resolution would be tantamount to interference with the decisions of another Committee.

28. **Mr. Toro Jiménez** (Bolivarian Republic of Venezuela), explaining his delegation's position, said that the Special Committee could have made a stronger case on assistance to third States affected by the application of sanctions. He also wished to dissociate his delegation from the provisions of the twelfth and thirteenth preambular paragraphs; any other course of action would imply acceptance of the legitimacy of the 2005 World Summit Outcome, which, as it had said before, his delegation considered null and void, except as a working paper.

The meeting rose at 1.05 p.m.

United Nations A/C.6/60/SR.22

General Assembly
Sixtieth session

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Sixth Committee

Summary record of the 22nd meeting
Held at Headquarters, New York, on Wednesday, 16 November 2005, at noon

Chairman: Mr. Yáñez-Barnuevo ..... (Spain)

Contents

Agenda item 83: Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel (*continued*)

Agenda item 80: Report of the International Law Commission on the work of its fifty-seventh session (*continued*)

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05-60593 (E)

The meeting was called to order at noon.

Agenda item 83: Scope of legal protection under the Convention on the Safety of United Nations and Associated Personnel (*continued*) (A/C.6/60/L.11)

1. **Mr. Wenaweser** (Chairman of the Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel and of the Working Group), introducing draft resolution A/C.6/60/L.11, said that he was pleased to report that all outstanding issues had been resolved and agreement had been reached on the text of an optional protocol to the Convention on the Safety of United Nations and Associated Personnel, which was annexed to the draft resolution. The text had been issued in all languages, although it appeared that there were some editorial mistakes in the French version.

2. The work on drafting an optional protocol had been motivated by deep concern over the continuing pattern of attacks against United Nations and associated personnel, whose legal protection was governed by the Convention, and by the need for an effective regime to bring the perpetrators of such attacks to justice, as reflected particularly in the first, second and fourth preambular paragraphs of the draft optional protocol. The aim was therefore to expand the scope of legal protection for such personnel.

3. The relationship between the draft optional protocol and the Convention was spelled out in draft article I, which stipulated that the protocol supplemented the Convention and that the two should be read and interpreted together as a single document. Accordingly, under the terms of draft article II, which was key to the extension of the scope of legal protection, the parties to the protocol should, in addition to United Nations operations as defined in article 1 (c) of the Convention, apply the Convention in respect of all other United Nations operations established by a competent organ of the United Nations and conducted under United Nations authority and control for the purposes of delivering humanitarian, political or development assistance in peacebuilding or delivering emergency humanitarian assistance. Article II was to be understood in the light of the third preambular paragraph of the optional protocol, which recognized that operations conducted for such purposes, which entailed particular risks for United Nations and associated personnel, required the extension of the scope of legal protection under the Convention to such personnel. However, article II, paragraph 1, of the optional protocol did not apply to permanent United Nations offices and specialized agencies established under an agreement with the United Nations.

4. The term "peacebuilding" had been the subject of extensive discussion. Although it had been critical to the achievement of a compromise on the text, attempts to define it had finally been abandoned. The understanding was that the arrangements envisaged in draft article II, paragraph 1, to conduct a given operation, together with relevant domestic legislation, would provide guidance on the intended scope of the term in relation to that operation. The scope of legal protection in the case of an operation for the delivery of humanitarian assistance in the event of a natural disaster had also been discussed. Under draft article II, paragraph 3, a State might make a declaration to the Secretary-General that it would not apply the provisions of the protocol with respect to an operation to deliver emergency humanitarian assistance for the sole purpose of responding to a natural disaster. Such an opt-out declaration should be made prior to the deployment of the operation.

5. Draft article III, while affirming the duty of a State party to the protocol to observe article 8 of the Convention, also asserted the State party's right to take action in the exercise of its national jurisdiction over any United Nations or associated personnel violating the laws and regulations of that State. It was clearly understood that any such action would not be in violation of any other international law obligation of the State party.

6. The draft resolution itself had been elaborated with a view to addressing some of the concerns raised during the negotiations on the draft optional protocol. It therefore contained new elements, while at the same time reflecting other factual and relevant information.

7. He drew attention to the provision, in the fourth preambular paragraph, reaffirming the importance of maintaining the integrity of international humanitarian law in the context of the Convention, which had been ratified or acceded to by 79 States to date. States were encouraged to enact national legislation, as necessary, that would enable the Convention and the draft optional protocol to be implemented. Such legislation

would be particularly necessary in the context of the term "peacebuilding". The draft resolution also contained a reference to paragraph 167 of the 2005 World Summit Outcome (A/RES/60/1), which stressed the need to conclude the negotiations on the optional protocol during the current session. As in previous years, the draft resolution reaffirmed the obligation of all humanitarian personnel and United Nations and associated personnel to respect the national laws of the countries in which they operated, in accordance with international law and the Charter of the United Nations. It also referred to the increasing dangers faced by such personnel in the field and underlined the need to promote the universality of the Convention.

8. He recommended that the draft resolution should be adopted without a vote. The flexibility and spirit of compromise shown by delegations, during what had been a difficult and lengthy process, had enabled the Committee to reach the stage at which it could take action on the text of a draft optional protocol that would enhance the legal protection of United Nations personnel engaged in duties on behalf of the international community, often under very difficult and dangerous circumstances.

9. **Mr. Elji** (Syrian Arab Republic), speaking in explanation of vote before the voting, said that his country fully respected the role played by United Nations personnel in performing their functions and that it would continue to make every possible effort to ensure the security and safety of such personnel in its territory. As he understood it, the peacebuilding mentioned in the draft optional protocol would be exclusively confined to post-conflict situations, thus excluding conflict and pre-conflict situations. The scope of the draft optional protocol consequently extended to the post-conflict peacebuilding defined in paragraph 97 of the 2005 World Summit Outcome. The draft optional protocol aimed to extend the scope of the Convention on the Safety of United Nations and Associated Personnel of 1994 so that it included United Nations peacebuilding operations and operations conducted for the purpose of delivering emergency humanitarian assistance which entailed particular risks. The risk element was therefore a prerequisite for application of the draft optional protocol. In order to make that point clear, the Arabic text should be brought into line with the English text through deletion of the first two commas which appeared in the third preambular paragraph of the former.

10. He affirmed the right of the State, pursuant to article 8 of the Convention, to take action in the exercise of its national jurisdiction over any United Nations or associated personnel who violated its laws and regulations. He also stressed that the Convention and the draft optional protocol aimed to protect the safety of United Nations and associated personnel and that immunities and privileges were accorded only to those who were covered under the Convention on the Privileges and Immunities of the United Nations.

11. **The Chairman** urged all linguistic groups to decide among themselves on specific wording that should be adopted and submit it to the Secretariat.

12. **Ms. Taj El Dine** (Bolivarian Republic of Venezuela) said that, although her delegation would join the consensus in adopting the draft resolution in the interest of extending the scope of legal protection to United Nations and associated personnel in situations of exceptional risk, it wished to make an interpretative declaration concerning three aspects of the draft resolution and the annexed draft optional protocol. First, it was her delegation's understanding that both the Convention on the Safety of United Nations and Associated Personnel and the draft optional protocol would not apply in situations governed by international humanitarian law. Secondly, the term "peacebuilding operations" lacked legal precision, therefore giving rise to conceptual ambiguities that should be avoided. Such operations appeared to constitute a new mechanism for intervention by States. Indeed, some States sought to twist the meaning of the term still further with their claim that such operations allowed broader scope for action as in pre-conflict and conflict situations. Her delegation therefore disassociated itself from the very concept of peacebuilding, as the term was used in the third preambular paragraph and article II, paragraph 1 (a), of the draft optional protocol. Moreover, her delegation interpreted the draft article as applying only to conflict situations involving exceptional risk.

13. Thirdly, natural disasters, referred to in draft article II, paragraph 3, did not necessarily generate situations involving risk for United Nations and associated personnel. It was, therefore, her delegation's understanding that the draft optional protocol would apply only to natural disasters that actually produced a

situation of exceptional risk. Moreover, the reference in that paragraph to a "host State" should be implicitly understood to refer to a host State party to the draft optional protocol, since only such States parties could assume or fail to assume obligations under the protocol.

14. **Mr. Guan** Jian (China) said that his delegation supported the draft resolution and the draft optional protocol. However, the Chinese version contained some inappropriate translations and his delegation would, as the Chairman had suggested, shortly submit proposed corrections to the Secretariat.

15. **Mr. Abdelsalam** (Sudan) said that his delegation was not convinced that the Committee had established the best possible text for the draft optional protocol. Negotiations over the past few years had aimed to fill the gaps in the Convention on the Safety of United Nations and Associated Personnel, as well as taking account of other developments on the ground. The aim of consensus, as reflected in the 2005 World Summit Outcome, was commendable, but consensus was not an end in itself but rather a vehicle for harmony and cooperation in drafting a text. As it stood, the optional protocol showed signs of haste in the drafting: the text was the very one on which the Committee had earlier disagreed. Some provisions still gave cause for doubt and argument. His delegation would, however, support the consensus on the draft resolution out of respect for the Committee's usual practice.

16. **Mr. Sandoval** (Colombia) said that, while his delegation supported the consensus on the draft resolution, it would have preferred to include in the text a legal definition of the term "peacebuilding", since the latter was a novel concept in international law. In the absence of such a definition, his delegation took it that the notion was restricted to post-conflict situations, given its current usage and the wording of paragraph 97 of the 2005 World Summit Outcome. His Government's commitment to the legal protection of United Nations and associated personnel was reflected in the steps it was taking in order to be able to accede to the Convention on the Safety of United Nations and Associated Personnel.

17. **Mr. Dolatyar** (Islamic Republic of Iran) said that his delegation looked forward to the adoption of the draft resolution and of the draft optional protocol annexed thereto. It had joined the consensus on the text on the understanding that the element of "particular risks", to which reference was made in the third preambular paragraph of the draft optional protocol, was important and needed to be verified in each case. His Government believed that the declaration mentioned in article II, paragraph 3, of the optional protocol could be made by a host State at any time prior to the deployment of operations under article II (1) (b).

18. **Mr. Llewellyn** (United Kingdom), speaking on behalf of the European Union, said that, in the light of the opinions expressed by previous speakers, the European Union was considering whether to explain its position on the optional protocol during the relevant debate in a plenary meeting of the General Assembly.

19. *Draft resolution A/C.6/60/L.11 was adopted.*

20. **Ms. Ramos Rodríguez** (Cuba) noting that the inclusion of the term "peacebuilding" had made it possible to find a compromise formula which had permitted the adoption of the draft optional protocol by consensus, despite the fact that no widely accepted definition of the notion existed, contended that that term would not be applicable to pre-conflict situations. Furthermore, her Government would not apply the provisions of the optional protocol to operations for the purposes of delivering emergency humanitarian assistance (article II, paragraph 1 (b)), because United Nations and associated personnel were at no particular risk in such situations and therefore required no additional protection over and above that which they received under the national legislation of the country in question and the agreement with the United Nations on the deployment of the particular operation.

21. **Mr. Díaz Paniagua** (Costa Rica) said that his Government maintained the reservation it had formulated to the Convention on the Safety of United Nations and Associated Personnel to the effect that, in the event of a conflict between that convention and international humanitarian law, his country would give precedence to the latter. Both the Secretary-General of the United Nations and the International Committee of the Red Cross had acknowledged the possibility of such a conflict which could, unfortunately, whittle away the protection international humanitarian law afforded civilians and combatants in armed conflicts. The fourth preambular paragraph of the draft resolution was therefore welcome.

22. Since the draft optional protocol widened the scope of application of the Convention on the Safety of

United Nations and Associated Personnel, his delegation was obliged to extend the above-mentioned reservation to the new legal instrument. It likewise reserved the right to explain its position in greater detail when the draft resolution was debated in a plenary meeting of the General Assembly.

23. **Mr. Lavalle-Valdés** (Guatemala) said that the fact that his delegation had not commented on the interpretative declaration made by Venezuela did not necessarily signify agreement. If more time had been available to study that declaration, he might have taken issue with it, or formulated reservations to it.

24. **Ms. McIver** (New Zealand) said that, from the outset, her Government had been committed to enhancing protection for United Nations and associated personnel in the belief that all United Nations political, humanitarian and development assistance operations deserved the legal protection established in the Convention on the Safety of United Nations and Associated Personnel. Although her Government had made substantial concessions in order to reach consensus on the draft resolution, it was delighted that the Sixth Committee had been able to make a practical contribution to the safety of those working for the United Nations at the field level in dangerous conditions.

25. **Mr. Hmoud** (Jordan) welcomed the adoption of the draft resolution. He hoped that the optional protocol would prove to be an effective means of widening the legal protection of United Nations and associated personnel and would help to prevent acts of aggression against them. He said that interpretative declarations made by delegations must be in line with the provisions of the Vienna Convention on the Law of Treaties on the interpretation of treaties (even if those declarations were made by States which were not parties to the Convention), as the latter was considered to be part of customary international law.

Agenda item 80: Report of the International Law Commission on the work of its fifty-seventh session (*continued*) (A/C.6/60/L.14)

26. **Mr. Hmoud** (Jordan), introducing draft resolution A/C.6/60/L.14, said that it followed the pattern of previous years' resolutions on the same item. Since the Commission appreciated the views and information it received from Governments on the topics on its agenda, he particularly drew attention to paragraphs 3 and 4 on that subject. Several paragraphs dealt with the Commission's working methods. Others focusing on cooperation between the Commission and Governments in the codification and progressive development of international law emphasized the improved relationship between the Sixth Committee and the Commission and underscored how important it was for Governments to consult national organizations and individual experts before they formulated their comments on the Commission's draft texts. The draft resolution also referred to the usefulness of the International Law Seminar and appealed to States to make urgently needed voluntary contributions to the Trust Fund for the Seminar. He trusted that, as in previous years, the Committee would adopt the draft resolution on the International Law Commission's report without a vote.

27. *Draft resolution A/C.6/60/L.14 was adopted.*

The meeting rose at 1.15 p.m.

United Nations A/C.6/60/SR.23

General Assembly
Sixtieth session

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Summary record of the 23rd meeting
Held at Headquarters, New York, on Tuesday, 29 November 2005, at 3 p.m.

Chairman: Mr. Samy (Vice-Chairman) ..... (Egypt)

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In the absence of Mr. Yañez-Barnuevo (Spain), Mr. Samy (Egypt), Vice-Chairman, took the Chair.

The meeting was called to order at 3.10 p.m.

Agenda item 108: Measures to eliminate international terrorism (*continued*) (A/C.6/60/L.12)

1. **Mr. Zyman** (Poland), introducing draft resolution A/C.6/60/L.12 entitled "Measures to eliminate international terrorism" on behalf of the Bureau, said that the many new elements in the resolution reflected the progress made on the item over the past year. The changes included new preambular paragraphs recalling the World Summit Outcome and reaffirming in particular the section on international terrorism, recalling Security Council resolution 1624 (2005) and welcoming initiatives to enhance interfaith and intercultural understanding.

2. A new paragraph 9 welcomed the adoption and opening for signature of the International Convention for the Suppression of Acts of Nuclear Terrorism, noted a number of other anti-terrorism instruments and urged all States to consider, as a matter of priority, becoming parties to them. Paragraph 16 requested the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime to continue its efforts to assist States to become parties to and implement the relevant conventions.

3. Paragraph 17 welcomed the publication by the Secretariat of the second volume of *National Laws and Regulations on the Prevention and Suppression of International Terrorism*. Paragraph 19 requested the Secretary-General to submit proposals to strengthen the capacity of the United Nations system to assist States in combating terrorism and enhance coordination of United Nations activities in that regard. Paragraph 26 welcomed any update by the Secretary-General of the comprehensive inventory of the response of the Secretariat to terrorism.

4. Paragraphs 20 to 25 concerned the work of the Ad Hoc Committee established by General Assembly resolution 51/210, noting the progress attained in the elaboration of a draft comprehensive convention on international terrorism, providing the mandate for the Ad Hoc Committee to continue that work and setting the dates for its meetings in 2006. As a sign of the commitment to make all efforts to fulfil the mandate of the Ad Hoc Committee expeditiously, the resolution did not refer to a meeting of the Working Group of the Sixth Committee during the sixty-first session of the General Assembly. In the event of completion of a draft comprehensive convention the Ad Hoc Committee was requested to report to the General Assembly at its sixtieth session and in any case to report on progress to the General Assembly at its sixty-first session.

5. **Mr. Mikulka** (Secretary of the Committee) said that, in connection with the request contained in paragraph 19 of the draft resolution, the Committee's attention was drawn to paragraph 13 of the report of the Secretary-General on implementation of decisions from the 2005 World Summit Outcome for action by the Secretary-General (A/60/430) regarding the intention of the Secretary-General to submit proposals by early 2006.

6. In connection with the paragraphs concerning the Ad Hoc Committee, the conference servicing requirements for its proposed meetings in 2006 were already programmed in the draft calendar of conferences and meetings for the biennium 2006-2007, so that if the draft resolution were adopted no additional resources would be required in the proposed programme budget.

7. *Draft resolution A/C.6/60/L.12 was adopted.*

Agenda item 116: Revitalization of the work of the General Assembly (A/C.6/60/L.16/Rev.1)

8. **The Chairman** drew attention to draft decision A/C.6/60/L.16/Rev.1, containing the Committee's provisional programme of work for the sixty-first session of the General Assembly, as proposed by the Bureaux. It was based on the assumption that the items traditionally allocated to the Sixth Committee would be allocated to it in 2006 as well, without prejudice to allocation of any additional items to the Committee upon the recommendation of the General Committee.

9. **Mr. Diaz Paniagua** (Costa Rica) said that, although his delegation had no objection to the proposed programme of work, it was concerned that the Committee's list of agenda items seemed to grow shorter every year, while those of some of the other Main Committee's kept expanding. According to rule 98 of the rules of procedure of the General Assembly, the Sixth Committee was the Legal Committee, but many legal topics were being taken up by other Main Committees and the plenary General Assembly. In

annex II, part 2, paragraph 20, of the rules of procedure, it was mentioned that the General Committee, in making recommendations on the distribution of agenda items, would bear in mind the Sixth Committee's function as the Legal Committee, and in annex V, paragraph 30, a more balanced division of work among the Committees was recommended. Moreover, in annex II, part 1, paragraph 1 (d), the General Assembly recommended that when a Committee considered the legal aspects of a question important, it should refer it for legal advice to the Sixth Committee, and annex VII, paragraph 3, reiterated the point.

10. His delegation therefore requested that the Chairman should draw the attention of the President of the General Assembly to those provisions of the rules of procedure, so that, if the President thought it advisable, he might bring them to the attention of the General Committee. In addition, the Secretariat should be asked to send a copy of the provision and programme of work to the Division of Ocean Affairs and the Law of the Sea with a reminder that overlap should be avoided.

11. The Committee was fortunate to enjoy the services of a specialized secretariat in the Codification Division. His delegation intended to express its positive opinion of those services on the survey being circulated and hoped that other delegations would do the same.

12. *Draft decision A/C.6/60/L.16/Rev.1 was adopted.*

Agenda item 5: Election of the officers of the Main Committees

13. **The Chairman** reminded the Committee that in accordance with rules 99 (a) and 103 of the rules of procedure of the General Assembly, as amended by General Assembly resolutions 56/509 and 58/126, the Main Committees should elect a Chairman and a full Bureau at least three months before the opening of the next session, and he urged the regional groups to hold their consultations in good time.

Completion of the Committee's work for the main part of the sixtieth session

14. After an exchange of courtesies, in which **Mr. Davis** (Bahamas), **Mr. Panggabean** (Indonesia), **Mr. Peesteen** (Belgium), **Mr. Bennouna** (Morocco) and **Mr. Zyman** (Poland) spoke on behalf of the regional groups of States, **the Chairman** declared that the Sixth Committee had completed its work for the main part of the sixtieth session.

The meeting rose at 3.40 p.m.